TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 190.

THOMAS R. MARTIN, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 26, 1906.

(20,066.)

(20,066.)

SUPREME COURT OF THE UNITED STATES.

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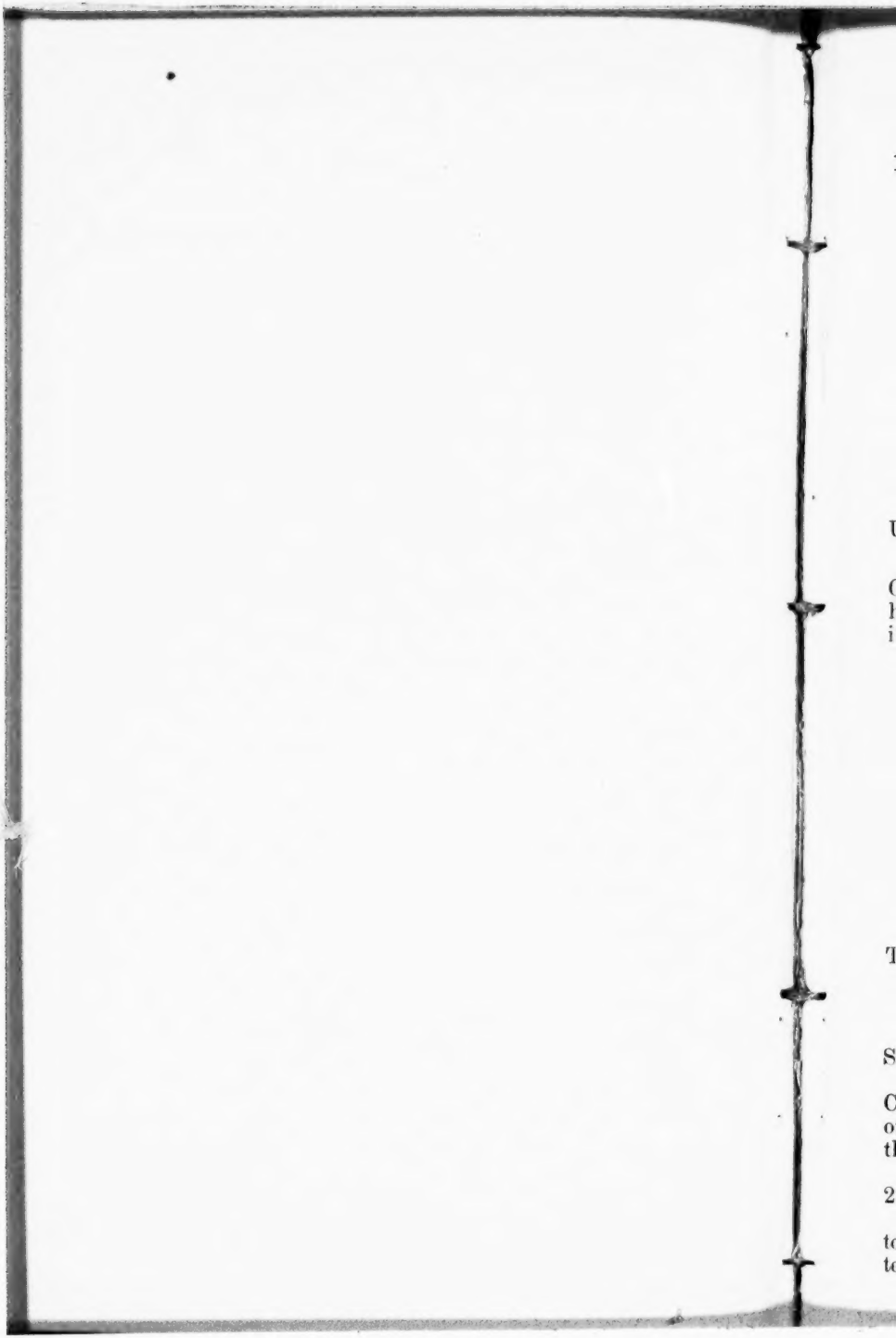

1 In the Court of Appeals of the District of Columbia.

No. 1585.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Supreme Court of the District of Columbia.

No. 46982. At Law.

THOMAS R. MARTIN, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

Petition for Certiorari.

Filed June 1, 1904.

In the Supreme Court of the District of Columbia.

No. 46982. Law.

THOMAS R. MARTIN, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Respondent.

To the honorable justice of the supreme court of the District of Columbia, holding a law court:

The petition of Thomas R. Martin respectfully shows:

1. That he is a citizen of the United States and a resident of the State of Maryland.

2. That heretofore, to wit, on the 4th day of March, 1896, one Clarence A. Brandenburg, being the owner in fee of the parcels of real estate in the District of Columbia known and described on the ground plats thereof as sub-lots 42 and 43, in square 69, the same abutting 20.43 and 20 feet respectively on an alley
2 running east and west in said square, and running back, the same width, to the depth of 75 feet, conveyed the same to Job Barnard and James S. Edwards, as trustees, upon the usual terms, to secure the payment to Florence E. Edwards, guardian,

of a certain promissory note of said Brandenburg and the renewals thereof for the sum of $1000, with interest, bearing date the 4th day of March, 1896, and payable to the order of said Florence E. Edwards, guardian, three years after date, which said deed of trust, was, on the day of its execution, duly recorded among the land records of the District of Columbia, in Liber 2099 at folio 328 *et seq.*

2. That at the time the proceedings for the opening of a minor street were had, as hereinafter set forth, in said square and for some time thereafter the said Florence E. Edwards was the owner and holder, in good faith, for value, of the promissory note aforesaid; that from time to time said note has been renewed and is now held by your petitioner, who acquired the same, in due course, through the said Florence E. Edwards, guardian, and for value; and the same has never been paid nor any part thereof.

3. That by an act of Congress approved July 22, 1892, the Congress of the United States undertook to authorize the Commissioners of the District of Columbia, to condemn, open, widen or straighten alleys, in the District of Columbia upon compliance with the terms and conditions of said act, and to authorize the collector of taxes of said District to levy a tax upon each lot or part of lot benefited by the opening, widening, extending, etc., of such alley.

4. That in and by an act of Congress approved August 24, 1894, said act of Congress approved July 22, 1892, was amended so as to "authorize the Commissioners of the District of Columbia, under the terms and conditions of said act, * * * to open minor streets in said District of a width of not less than forty feet, nor more than sixty feet, to run through a square from one street to another, whenever in the judgment of said Commissioners the public interest shall require it."

5. That thereafter, to wit, in the month of February, 1898, pursuant to an application in writing of the Commissioners of the District of Columbia, and purporting to be made pursuant to the authority attempted to be conveyed by the acts of Congress aforesaid, the marshal of the District of Columbia, summoned a jury of twelve persons, "to ascertain the damages which may (might) accrue to any individual or individuals" by the opening of a street in said square 69, to be known as Newport place, by the widening of the 30 foot alley running east and west in said square to a width of 60 feet and the extension of the same by the latter width through said square from 21st to 22nd streets which said streets bounded said square on the east and west sides thereof respectively.

6. That such proceedings were therefore had, that said jury so impanelled, presided over by the marshal's deputy, and not under the supervision of any judicial tribunal, thereafter, to wit, on the 17th of March, 1898, made its award and finding, whereby they
3 undertook to condemn for the purposes of said street a part of said sub-lots 42 and 43, that is to say, 40 feet 3 inches, the width thereof, fronting upon said proposed street, by a depth of 15 feet, or one-fifth of the total area thereof, and the respondent,

pursuant thereto, has taken actual possession and control thereof for the purposes of said street.

7. That in said proceedings the jury undertook to allow as the value of the land so taken, $92. for said part of sub-lot 42 and $75. for said part of sub lot 43; that said amounts were never paid nor tendered to be paid but the respondent has sought to deduct the amounts thereof from the total amount of the tax apportioned against the portions of said sub-lots remaining.

8. That in said proceedings said jury apportioned an amount equal to the amount of damages awarded for the land condemned including the expenses of the proceeding, among the several lots in said square, of which amount they charged against the remainder of said lot 42 the sum of $650, less the sum of $92, the value of the portion taken, and against the remainder of said lot 43, the sum of $550 less the sum of $75, the value allowed for the portion thereof taken.

9. That no right *or* revision or review—said finding of said jury existed, and thereafter, the respondent attempted to levy as a tax or charge against said sublots, under the provisions of the acts of Congress heretofore mentioned, the amounts so fixed by said jury, that is to say, the sum of $650 less $92 against said sublot 42 and $550 less $75 against said sublot 43, which said sums are carried on the books of the respondent as taxes against said lots, and because of the nonpayment thereof, the respondent threatens a sale thereof.

10. Your petitioner avers that said charges or taxes and each of them are void and illegal, that said Commissioners were not authorized by said acts of Congress or either of them, or by any other law or part of law to open a minor street in said square, or to levy a tax or charge in the manner, in which "minor street" was opened and said taxes or charges were levied.

11. Your petitioner respectfully charges that the acts of Congress under which the proceedings aforesaid were had and pursuant to which the respondent undertook to levy the taxes aforesaid against the lots aforesaid, were and are unconstitutional and void, because they provide for the taking of private property for public uses without making just compensation and without due process of law, in this: 1. That they do not provide for the giving of notice of the proposed taking; 2. In that they provide for the apportionment of the total amount of the damages awarded for the land condemned together with the expenses of the proceeding, among the lots in the square through which the proposed street or alley is to be opened, without regard to the actual benefits; 3. In that they limit the area of assessment to such particular square, without regard to the benefit to adjacent squares, and without regard to the fact that the actual benefits to the square improved may not equal the total
4 cost of the improvement; 4. Because they arbitrarily require the assessment of such total cost to the particular square improved, without a legislative determination of the actual benefits or the area benefited, such determination being impossible because said laws are general in nature and were passed without a legis-

lative consideration of the particular improvement, the same not being in contemplation at the time, but arising subsequently.

12. Your petitioner further avers that the records in the custody of the respondent show numerous irregularities and illegalities in the supposed levy of said charges, among which are the following:

(*a.*) That said Commissioners did not nor, did any one else, open or authorize the opening of any minor street in said square, but that they widened and extended a thirty foot alley theretofore existing in said square, without any authority whatsoever so to do, but levied said taxes for the opening of a minor street.

(*b.*) That no plat of any minor street to be opened accompanied by a petition of the owners of more than one-half of the real estate in the square aforesaid was presented to the Commissioners. That the petition presented related to widening an alley and not to opening a minor street and was signed by thirty-six persons who did not own more than half of the real estate in said square and by a trustee who was not authorized by his beneficiaries to sign and who had no power to sign said petition. That the total number of square feet in said square was, to wit: 210,266.80, and the petition presented to the Commissioners of said District as aforesaid was not the petition of the owners of more than one-half of the real estate in said square.

(*c.*) That it does not appear that the Commissioners of the District of Columbia certified that the preservation of peace, good order and public morals, required that any such alley or minor street should be opened, extended, widened or straightened.

(*d.*) That it does not appear that the health officer of said District certified that such opening, widening or extending was necessary for the public health.

(*e.*) That the said Florence E. Edwards, guardian, was not consulted as to the propriety of said work, and in fact had no opportunity in advance to be heard as to the utility, necessity or nature of said work, or afterwards as to the apportionment of the cost thereof.

(*f.*) That no notice whatever was given to the said Florence E. Edwards, guardian, holder of the note aforesaid, secured upon said lots as aforesaid, of the proceedings for the condemnation of the land in said square, or of the assessment of the taxes aforesaid against said lots, whereby the area of the land covered by the deed of trust securing said note was reduced one-fifth by the portion thereof taken and now appropriated to public use, and there was interposed between the note aforesaid and the security thereof, a tax or assessment amounting to $1200.00.

(*g.*) That the value of the land taken or fixed by said jury was twenty-five cents per square foot, while the amount of assessment apportioned against the same was twice as much, to wit, 50 cents per square foot, and petitioner expressly charges that said assessment is more than 50% in excess of the actual benefits and in itself, was at the time of the levy thereof, and still is in excess of the value of the land in said lots, whereby the security for said note, without any notice whatever, has been wholly destroyed.

(*h.*) That there was not in fact any ascertainment by said jury of actual benefits; on the contrary, there was only an apportionment of the damages awarded in said proceedings and the costs thereof, among the lots in said square.

13. Petitioner further says that after the proceedings hereinbefore mentioned were had, there were certain further sums, aggregating a large amount, assessed against said lots of ground under the guise of street improvements, curbing and water main, all of which taxes were illegally assessed against said property as street improvements under laws conferring authority to levy taxes for the improvement of streets, whereas, your petitioner avers that legally there never was and is not such a street as Newport place, the proceedings under which an attempt was made to create the same being null and void for the reasons hereinbefore set forth.

14. Petitioner avers that by reason of the proceedings aforesaid, your petitioner has been injured and has no appeal.

Wherefore he prays:

I. That a United States writ of certiorari may issue from this court commanding the District of Columbia to certify immediately to this court a copy of each and every record and part of record in its custody relating in any manner to charges and taxes made against any part of sub-lot 42 and sub-lot 43, in square 69, city of Washington, District of Columbia, and purporting to be charges or taxes levied under the authority of acts of Congress approved July 22, 1892 and August 24, 1894 or either of them, together with a full and true copy of any petition by owners of property in said square, made to said Commissioners, and a full copy of every assessment charge or tax made or purporting to be made for either benefits or damages to any owner or owners of property in said square, together with a copy of all advertisements, measurements, computations, surveys, assessments, notices of assessments to proprietors and returns of manner service of any of such notice: and also, true copies of all records relating to any special improvements, taxes assessed against said lots since the opening of said Newport place.

II. That upon the coming in of said returns, the said alleged assessments or charges may be quashed and annulled by the judgment of this court.

THOMAS R. MARTIN.

BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

6 DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof, that the matters and things therein set forth of my own knowledge are true, and those set forth upon information and belief, I believe to be true.

THOMAS R. MARTIN.

Subscribed and sworn to before me this 25th day of April, A. D. 1904.

[SEAL.] LEE R. MARTIN,
Notary Public, D. C.

(Endorsed.)

JUNE 1, 1904.

Let the writ issue as prayed.

JOB BARNARD, *Justice.*

Motion to Quash.

Filed September 9, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 46982.

THOMAS R. MARTIN
v.
DISTRICT OF COLUMBIA.

Now comes the defendant, The District of Columbia, by its attorneys, and moves the court to quash the writ of certiorari issued in the above entitled cause, because:—

1. The petitioner, Thomas R. Martin, is not the owner of the property described in the said petition, holding neither the legal nor the equitable title, but is merely the holder of a promissory note secured by deed of trust thereon.

2. The owner of the said property, Clarence A. Brandenburg, has heretofore brought action, at law, No. 42961, to set aside the same assessments against the same property as that described in the petition in this case.

A. B. DUVALL,
F. H. STEPHENS,
Attorneys for Defendant.

7 *Judgment.*

Supreme Court of the District of Columbia.

FRIDAY, *May* 19, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

At Law. No. 46982.

THOMAS R. MARTIN, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

Upon hearing the petition, writ of certiorari, and the motion to quash the writ, it is considered that said motion be, and hereby is granted: Therefore, it is considered that the writ of certiorari be, and it hereby is quashed and for nothing held, and that the petition be, and the same is hereby dismissed at the costs of the petitioner.

The petitioner notes an appeal to the Court of Appeals, and the bond for costs is fixed in the penalty of $100.00.

Memorandum.

May 29th, 1905.—Appeal bond filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 11, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 46,982, at law, wherein Thomas R. Martin is petitioner, and The District of Columbia is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of July, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1585. Thomas R. Martin, appellant, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Jul- 18, 1905. Henry W. Hodges, clerk.

8 THURSDAY, *October 5th, A. D.* 1905.

No. 1585.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

and

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

The argument in the above entitled causes was commenced by Mr. E. C. Brandenburg, attorney for the appellants, and was continued by Mr. F. H. Stephens, attorney for the appellee, and was concluded by Mr. E. C. Brandenburg, attorney for the appellants.

9 No. 1585.

THOMAS R. MARTIN, Appellant,
v.
DISTRICT OF COLUMBIA, Appellee.

Opinion.

Mr. Justice DUELL delivered the opinion of the Court:

In the case of Brandenburg *v.* District of Columbia, decided at this term of the court, we have determined adversely to the appellant all the questions raised by this appeal, save whether Thomas R. Martin, the appellant, was entitled to notice of the proceedings referred to in Brandenburg *v.* District of Columbia, *supra.* Reference is made to that case for the facts relative to the proceedings under which parts of the lots referred to in the record in this case were taken, damages awarded for such taking, benefits to the remaining parts of the lots apportioned against them, and the damages deducted from the benefits, and the balance made a charge upon the lands remaining.

The additional facts disclosed by this record, so far as necessary to be considered, show that prior to the proceedings above referred to, Brandenburg, being the owner in fee of the lots in question, conveyed the same to certain persons, as trustees, upon the usual terms, to secure the payment to one Florence E. Edwards, guardian, of a certain promissory note of said Brandenburg, and the renewals thereof, for the sum of one thousand dollars, with interest, and payable to her three years after date. Such deed of trust was duly recorded among the land records of the District of Columbia. At the time when the proceedings referred to were

taken, Florence E. Edwards was the owner and holder of the note. Later, but at what exact time does not appear, the appellant became the owner, for value, of the note, acquiring ownership from Edwards, the payee. The note was unpaid at the commencement of these proceedings in April, 1904. It will be seen by reference to the Brandenburg decision that the condemnation proceedings were had early in 1898.

The question to be determined herein, as stated by appellant, is whether he as the holder of the note, the payment of which is secured by trust deed, has such an interest in the property as permits him to question in this proceeding the validity of the special assessment for opening Newport Place, the name given to the street, as widened by the procedings.

To put it exactly, the question is whether Martin, who became the owner of the note after the proceedings complained of were had, can attack, in an independent suit, and in his own name, the special assessment, because notice of the same was not given to the owner of the note at the time of the taking of the proceedings, or to the trustees named in the trust deed. We are of the opinion that he can not sustain this proceeding, for the reason that at the time the proceeding was had he was neither the owner of the property in question nor had any interest, of any name or nature, therein. After the proceedings were had he became the owner of the note. The matter of the proceedings had become a public record. We do not think that, conceding that the payee and holder of the note had a right to notice, he, as the now owner of it, can attack the proceedings in an independent proceeding brought by him and in his own name. We, however, do not think that the original payee of the note was entitled to notice of the proceedings, for the act says that notice shall be given to the proprietors of the land. A holder of a note, the payment of which is secured by a deed of trust, is no more the proprietor of the land referred to in such a deed than is the holder of a bond, secured by a mortgage upon property, the owner of that property, or part owner of it, were it a case where one mortgage was given to secure more than one bond. In the latter case it would be practically impossible to take any steps under the act in question when the owner of the property had executed a trust deed or mortgage to secure an issue of notes or bonds. If, under the act, or if upon any legal ground, notice is required to be given to any one when a deed of trust or mortgage is outstanding, such notice would, in our opinion, only have to be given to the trustee or trustees named in the deed of trust or mortgage, not to the holders of notes or bonds to secure the payment of which the deed of trust or mortgage was given. As this is not a proceeding brought by or in the name of the trustees named in the deed of trust, it is unnecessary to decide whether notice should have been given to them. No reason is set forth in the petition why any rights of the appellant can not be protected and enforced by the trustees of the deed of trust.

To hold that holders of notes, payment of which is secured by trust deeds, are entitled to notice of proceedings of this character disclosed by the petition herein would establish an unwise precedent.

The court below did not err in quashing the writ, and its judgmen should be affirmed with costs. And it is so ordered.

Affirmed.

11 WEDNESDAY, *November 8th, A. D,* 1905.

No. 1585, October Term, 1905.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE DUELL.

November 8, 1905.

12 In the Court of Appeals of the District of Columbia, October Term, 1905.

No. 1585.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

To the Honorable Judges of the Court of Appeals of the District of Columbia:

Comes now Thomas R. Martin, the above named appellant, by his attorneys, and complains that in the record and proceedings in said cause, and also in the judgment of the Supreme Court of the District of Columbia dismissing the petition of said appellant, and in the judgment of said Court of Appeals of the District of Columbia affirming the judgment of said Supreme Court of the District of Columbia, manifest error hath happened to the great damage of said appellant.

Wherefore, said appellant, prays for the allowance of a writ of error, for the reasons specified in the assignment of errors herewith filed, and for an order fixing the amount of bond for costs

in said cause, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated at Washington, D. C., November 16, 1905.

THOMAS R. MARTIN,
Appellant and Petitioner,
By BRANDENBURG & BRANDENBURG,
His Attorneys.

13 In the Court of Appeals of the District of Columbia, October Term, 1905.

No. 1585.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Assignment of Errors.

Comes now the said Thomas R. Martin, appellant in the above entitled cause, by his attorneys, and files the following assignment of errors upon which he will rely in the prosecution of the writ of error in the above entitled cause:

1. That the Supreme Court of the District of Columbia erred in dismissing the petition of the petitioner, appellant herein, and rendering judgment against said petitioner.

2. That said Court erred in finding and holding that the petitioner had no such interest in the property in the petition described as entitled him to question the validity of the proceedings for the condemnation of the land and the assessment of benefits in his said petition mentioned.

3. That said Court erred in finding and holding that the Act of Congress, pursuant to which said proceedings were had, was Constitutional and valid.

4. That said Court erred in finding and holding that the proceedings in said petition mentioned were in accordance with law and valid.

5. That the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District of Columbia dismissing the petition of petitioner.

6. That said Court of Appeals erred in finding and holding that the petitioner had no right to question the validity of the proceedings in his said petition mentioned.

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7. That said Court of Appeals erred in finding and holding that the Act of Congress, pursuant to which the proceedings in said petition mentioned were had, is Constitutional and valid.

8. That said Court of Appeals erred in finding and holding that the proceedings in said petition mentioned, for the condemnation of land and the assessment of benefits, were in accordance with law and valid.

Wherefore, the said Thomas R. Martin, appellant herein, prays that the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, may be reversed and that the proceedings for the condemnation of the land and for the assessment of benefits in these proceedings mentioned, may be set aside and for naught held.

BRANDENBURG & BRANDENBURG,
Attorneys for Appellant.

(Endorsed:) No. 1585. In the Court of Appeals. Oct. Term 1905. Thomas R. Martin *vs.* The District of Columbia. Petition for writ of error and Assignment of Errors. Court of Appeals, District of Columbia, Filed Jan. 4, 1906. Henry W. Hodges, Clerk.

15 THURSDAY, *January 4th, A. D.* 1906.

No. 1585.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

On motion of Mr. E. C. Brandenburg, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Thomas R. Martin, appellant and The District of Columbia a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of January, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

17 (*Bond on Writ of Error.*)

Know all Men by these Presents, That I, Thomas R. Martin, as principal, and Gertrude E. Brandenburg, as surety, are held and firmly bound unto The District of Columbia in the full and just sum of Three Hundred dollars to be paid to the said The District of Columbia certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of December, in the year of Our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Thomas R. Martin and the District of Columbia a judgment was rendered against the said Thomas R. Martin and the said Thomas R. Martin having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The District of Columbia citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Thomas R. Martin shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS R. MARTIN. [SEAL.]
GERTRUDE E. BRANDENBURG. [SEAL.]

Sealed and delivered in the presence of—
E. C. BRANDENBURG.

O K.
E. H. T.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1585 Thomas R. Martin Appellant *vs.* The District of Columbia. Bond on Writ of Error to Supreme Court U. S. Court of Appeals District of Columbia Filed Jan. 12-1906 Henry W. Hodges Clerk

18 UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Thomas R. Martin is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of January, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Jan. 12, '06.—Service accepted.
F. H. STEPHENS,
Asst. Corp. Counsel.

[Endorsed:] Court of Appeals, District of Columbia, Filed Jan. 12 1906 Henry W. Hodges, Clerk.

19 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 18 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Thomas R. Martin *vs.* The District of Columbia No. 1585, January Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 15th day of January A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,066. District of Columbia Court of Appeals. Term No. 190. Thomas R. Martin, plaintiff in error, *vs.* The District of Columbia. Filed January 26th, 1906. File No. 20,066.

IN THE

Supreme Court of the United States.

October Term, 1906.

THOMAS R. MARTIN, *Plaintiff in Error*,
v.
THE DISTRICT OF COLUMBIA. } No. 190.

BRIEF OF PLAINTIFF IN ERROR.

This is a proceeding instituted originally in the Supreme Court of the District of Columbia to quash certain taxes levied against certain lots in square 69, in the city of Washington, to cover cost of opening a minor street in said square. The original petition was filed in the year 1900. An amended petition was filed on June 3, 1904 (Record, p. 1).

The respondent, the District of Columbia, filed a motion (Record, p. 6) to quash the writ of *certiorari* issued upon the amended petition of the plaintiff in error for the reasons, therein assigned, that the plaintiff in error is not the owner of the property described in the petition, but it is merely the holder of a promissory note secured thereon by deed of trust, and secondly, that a similar proceeding had been instituted by the owner of the property and was then pending.

The petition shows that on March 4, 1896, Clarence A. Brandenburg, being the owner in fee of sublots 42 and 43 in square 69 in the city of Washington, the same

abutting 20.43 and 20 feet respectively on an alley running east and west in said square, and running back by the same width to a depth of 75 feet, conveyed the same to Job Barnard and James S. Edwards, as trustees, upon the usual terms, to secure the payment to Florence E. Edwards, guardian, of a certain promissory note of said Brandenburg and the renewals thereof, for the sum of $1,000, with interest, the same bearing date the 4th day of March, 1896, and payable to the order of said Florence E. Edwards, guardian, three years after said date, with interest, and that said deed of trust was on the same day duly recorded among the land records of the District of Columbia. That at the time the proceedings for the opening of a street as hereinafter stated were had, said Florence E. Edwards was the owner and holder, in good faith, for value, of the note mentioned, which note has been from time to time renewed and is now held by the petitioner, who acquired the same in good faith, in due course, from the said Florence E. Edwards, guardian, and for value and that the same has never been paid nor any part thereof.

The petition further avers that pursuant to the provision of the act of Congress approved July 22, 1892, and the amendment thereof, authorizing the opening and extending of alleys and minor streets, the Commissioners of the District of Columbia, upon the request of the supposed owners of more than one-half of the land in said square, in February, 1898, made an application in writing to the Marshal to summon a jury to condemn the land necessary for the opening of a minor street in said square, to be known as Newport Place, by the widening of the thirty-foot alley referred to, to a width of sixty feet and the extension of the same by that width through the square from 21st to 22d streets. Pursuant to such request, a jury so impaneled, and presided over by the

Marshal's deputy, and not under the direction or control of any judicial tribunal, on March 17, 1898, made its award and finding whereby they undertook to condemn for the purposes of said street a part of said sublots 42 and 43 covered by the deed of trust aforesaid, that is to say, 40 feet 3 inches, the width thereof, fronting upon said proposed street, by a depth of 15 feet, or one-fifth of the total area of said lots, and at the same time undertook to allow as the value of the land so taken, at the rate of 25 cents per square foot, the sum of $92 for the part taken of sublot 42 and $75 as the value of the part of sublot 43 taken, but these amounts were never paid to the owner nor to the petitioner, to be credited upon the notes secured thereon, but the jury deducted the same from the total amount of the tax or charge apportioned against the residue of said lots, presumably as benefits. The jury, pursuant to the requirements of the law, undertook to apportion the total amount of damages awarded for the land condemned, together with the costs of the proceedings, against the lots in said square, and of this amount, they charged against the residue of said sublot 42, having a remaining depth of 60 feet only, the sum of $650, less the sum of $92 allowed as the value of the part of said lot taken and against said sublot 43 the sum of $550, less the sum of $75 allowed as the value of the part of said sublot taken.

Pursuant to the finding of this jury, the assessor of the District undertook to levy against the residue of said sublots the amounts so fixed by the jury, which, together with liberal interest, remain as charges against said lots, and because of nonpayment, the Collector has notified the owner of his purpose to sell the same. And the Collector has also levied taxes for water, sewer, paving, grading and curbing.

Immediately after the return was filed the owner of the

property instituted proceedings in the Supreme Court of the District of Columbia to quash said assessment for the opening of said street alleging the unconstitutionality of the act of Congress under which the proceedings were taken, and the invalidity of the tax, if the act be valid, because of the failure to observe the requirements of law in its assessment, and this proceeding is still pending.

The petition in this case further alleges that no notice whatever, either by publication or personal service, was given to the trustees under the deed of trust or the owner and holder of the note secured thereby upon the lots in question; and further, that, without notice, there has been taken away one-fifth of the land theretofore securing the said note, and appropriated to public uses, and interposed between the land and note held by the petitioner, a tax amounting to $1,200; that is to say, as a result of the proceedings, instead of having a first lien upon two lots 20 feet by 75 feet deep each, the note is secured upon two lots only 20 feet front by 60 feet deep each, and these lots are subject to the previous lien of a special tax for $1,200.

The petition further alleges that the value of the land taken, as fixed by the jury, was 25 cents per square foot, while the amount of the assessment apportioned against the same was twice as much, to-wit, 50 cents per square foot, and the petitioner expressly charges that said assessment is more than 50 per cent in excess of the actual benefits, and in itself, was, at the time of the levy thereof, and still is in itself in excess of the value of the land in said lots, notwithstanding the opening of said street, whereby the security of said note, without notice, has been wholly destroyed.

The petition alleges that the act of Congress under which these proceedings were had is unconstitutional, because it authorized the taking of property without due process of

law and without just compensation, and further, assuming the validity of the law, that the tax itself is invalid because of the failure to give notice and because of the various other grounds specifically mentioned in the petition.

A writ of *certiorari* was duly issued upon the filing of the petition. No return was filed, but instead, the respondent filed a motion to quash the writ on two grounds, first, because the petitioner is not the owner of the property described in the petition, but is simply the holder of a promissory note secured by deed of trust thereon; and secondly, that the owner of the property has heretofore brought suit to set aside the same assessments against the same property. The Supreme Court of the District of Columbia granted this motion, quashed the writ and dismissed the petition (Record, p. 7). From this judgment, an appeal was prosecuted to the Court of Appeals of the District of Columbia, and that court on the 8th day of November, 1905, affirmed the judgment of the court below. The case comes to this court on writ of error to the Court of Appeals to review its action in affirming the judgment of the court below.

Assignments of Error.

1. That the Supreme Court of the District of Columbia erred in dismissing the petition of the petitioner, appellant herein, and rendering judgment against said petitioner.

2. That said court erred in finding and holding that the petitioner had no such interest in the property in the petition described as entitled him to question the validity of the proceedings for the condemnation of the land and the assessment of benefits in his said petition mentioned.

3. That said court erred in finding and holding that the act of Congress, pursuant to which said proceedings were had, was constitutional and valid.

4. That said court erred in finding and holding that

the proceedings in said petition mentioned were in accordance with law and valid.

5. That the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District of Columbia dismissing the petition of petitioner.

6. That said Court of Appeals erred in finding and holding that the petitioner had no right to question the validity of the proceedings in his said petition mentioned.

7. That said Court of Appeals erred in finding and holding that the act of Congress, pursuant to which the proceedings in said petition mentioned were had, is constitutional and valid.

8. That said Court of Appeals erred in finding and holding that the proceedings in said petition mentioned, for the condemnation of land and the assessment of benefits, were in accordance with law and valid.

BRIEF.

The facts set up in the petition are, for the purposes of this hearing, conceded to be true. The question is whether they authorize the petitioner to question the validity of the assessments complained of.

We do not consider that the second ground assigned for quashing the writ in this case, calls for any particular consideration. The question sought to be raised—that is, the pendency of a different suit by a different person, though having the same object, can not be raised on a motion to quash in this manner. In the second place, if the petitioner has any interest in the property and any right to question the validity of the tax complained of, the fact that some one else, having a totally different right, is seeking to maintain a suit to protect that right, can not effect or impair the right of the petitioner to question the tax so far as it affects him. There may be any number of suits, brought

for identically the same purpose, by different people, having different interests, whose interests are differently affected. How a citizen can be deprived of his right to maintain a suit to protect his interests because some one else has seen fit to sue for the same reason is too difficult a problem for us and we are compelled to pass the matter without further comment.

The real question, and as we believe the only question raised by this motion, is whether the petitioner, as the holder of a note secured upon the lots described, has such an interest therein that he may question in this proceeding the validity of the special assessment for opening Newport Place.

The only section of the act of Congress (27 Stat. L. 255), under which the proceedings were conducted, relating to the subject of notice, is Section 6, and that section provides as follows:

> "That the said marshal shall give or cause to be given at least ten days' written or printed notice of the time and place of the meeting of such jurors for the purpose aforesaid to *each proprietor of land* in the square designated as the location of such alley."

As shown, no notice whatever was given to the holder of the note or the trustees under the trust securing the same, whether by publication or by personal notice. There was in this case no notice by publication of any character.

This note and the trust securing the same were outstanding at the time the proceedings for the opening of the street were had. One-fifth of the area of land covered by the trust has actually been taken and appropriated to public uses, and a tax of $1,200, twice the value of the land as fixed by the jury itself, has been interposed between the security for the note and the land itself. The

amount allowed by the jury for the land thus taken was not paid to the petitioner or applied as a credit on the note, nor was it paid to the owner of the property, but was deducted from the amount of tax assessed against the residue of the lots. The question then is, can the government take away the the security of the petitioner without notice. The mere statement of the situation seems to carry the answer.

It is undoubtedly the law that notice must be given before a special assessment can become a valid charge against property. The question is rather, whether the petitioner is one of the persons legally entitled to notice.

In Allman *v.* District of Columbia, 3 App. D. C. 24, the Court of Appeals said:

> "Reasonable notice at some serviceable stage of the proceedings is absolutely necessary to the validity of an assessment."

To the same effect are:

> Paulsen *v.* Portland, 149 U. S. 30.
> San Mateo *v.* S. P. R. R., 13 Fed. 722, and others.

The Constitution provides that private "property" shall not be taken for public use without just compensation, nor shall any person be deprived of his "property" without due process of law. No doubt it was because of this requirement that the Marshal undertook to give a notice, though imperfect, to the owner of the property. It was given because he had a "property" interest in the land condemned, and the land assessed, and not because of the extent or value of such interest; that is to say, he was given notice because he had an interest therein, recognized by law, that could be affected by the proceedings. How much more so then, was the holder of the note secured by the trust and the trustees in such trust entitled to

notice? The interest of the holder of the note was not only substantial and valuable, but it was a legal interest, recognized by law, and one that could not, in any proceeding or in any manner, by the government or by private individuals, be displaced, without notice and without the consent of such holder, except in the exercise of the right of eminent domain, in which event, in addition to notice, such holder became entitled to compensation to the extent his interests were affected. The real test as to who shall receive notice is whether the "property" of the person will be "affected" by the proceeding, and if so, notice is essential, and if this "property" is taken or damaged or its value impaired, the holder of such "property" interest is entitled to compensation. The word "property" as used in the Constitution is not limited to real property. The word "property" is *nomen generalissimum*, and extends to every valuable right and interest, including real and personal property, easements, franchises, incorporeal hereditaments; in fact, everything that is the subject of ownership.

Am. & Eng. Ency. Vol. 23, p. 262 and cases cited.

This being so, specifically, is the interest of the holder of a note secured by deed of trust, an interest in "property?"

A mere lien upon real estate is included in the term.

Old Colony etc. *v.* Plymouth, 14 Gray, 161.

A mortgage is property.

Wilson *v.* Ward, 67 Fed. Rep. 677.
Horton *v.* McKee, 68 Fed. Rep. 404.
People *v.* Eddy, 43 Cal. 331.
Stebbins *v.* Stebbins, 86 Mich. 481.
Aggs *v.* Shackelford, 85 Tex. 145.

So are all equitable titles.

Gray *v.* Central Mass. R. R., 171 Mass. 116.

Choses in action are property.

Jenkins *v.* International Bank, 106 U. S. 571,

Was therefore the "property" of the holder of the note in this case affected or in fact, partly taken? It is obvious from the facts in this case that the property of the holder of the note was much more affected than the property of the owner of the equitable title merely. We call attention of the court to the fact that this case involves two elements, one, the question arising out of the taking of the property, and secondly, the imposition of an assessment for special improvements. Cases frequently arise where lots abutting upon a proposed street are assessed for benefits, and these lots, at the time of assessment, are subject to deeds of trust or mortgages. But this case goes a step beyond. Part of the land conveyed by the trust and covered thereby was actually taken, and the compensation allowed for the part thus taken, instead of being paid to the holder of the note, was applied as a credit on the amount of the assessment against the residue of the lots. As a result of this proceeding therefore, we have one-fifth of the property covered by the trust actually taken, and against the residue of the land securing the note, a special tax amounting to $1,200 interposed between the land and the security for the notes. And the amount of the assessment in itself being twice the value of the land, the result is, as averred in the petition, that the security for the note has been absolutely destroyed without compensation and without any notice whatever to the holder of the note.

It may be suggested that a deed of trust may be likened to the lien of a judgment which some authorities seem to hold need not be recognized in paying for condemned land, and not long since the Commissioners were advised they might pay over to the "owner" the value of land condemned without regard to the lien of a judgment of which the authorities had notice. If that is the law, it needs revision. But there is a wide difference between

the lien of a judgment, created by law and which may in like manner be withdrawn without compensation, and the lien of the holder of a note secured by an absolute conveyance of the legal title to the property. And it is not even the case of a mortgage which in some jurisdictions is regarded merely as security for a debt, the conveyance by way of mortgage being accompanied by a defeazance of title. A deed of trust is now, and always has been, an absolute conveyance of the legal title, which can only be revested in the grantor by a formal conveyance by way of release from the trustees named in the trust, with the consent of the holder of the note secured thereby. Mere payment itself does not revest title.

In the United States *v.* Commonwealth Title Co., 193 U. S. 651, the Supreme Court, in considering the nature of a mortgage, said:

> "A brief definition of a mortgage under modern law is not easy to make. At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void upon such payment or performance. By more modern law and under the statutes of many States a mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as 'both a lien in equity and a conveyance at law.' Pom. Eq. Jur. Sec. 1191. The interest of a mortgagee in the land is, therefore, conveyed to him by the mortgagor, and even if, under the laws of Montana, a mortgage is primarily security for a debt, and creates a lien only, it is a lien which may become the title. The decree of the court conveying the title is, of course, the act of the law, but it is the act of the law consummating the act of the mortgagor. And the sale and deed relate to the date of the mortgage, conveying the title which was then possessed by the mortgagor."

The deed of trust in common use in the District is much

more than a mortgage, and absolutely carries, at law, the title of the grantor. If he conveys thereafter, he conveys his equity merely, not the legal title. The legal title is outstanding in the trustees under the trust. And this title is a fee though not an absolute fee. Is then the owner of a fee title (though qualified), in whom is vested, as stated by the Supreme Court, the "interest of the mortgagor," entitled to notice when his property is actually taken? The code of the District, declaratory of the law as it previously existed, in section 522, provides:

> "The legal estate conveyed to a mortgagee, his heirs and assigns, or to a trustee to secure a debt, his heirs and assigns, shall be construed and held to be a qualified fee simple, determinable upon the release of the mortgage or deed of trust, as hereinafter provided, or the appointment of a new trustee by judicial decree for the causes hereinafter mentioned: provided, that nothing in this section contained shall prevent the passing of an absolute and unqualified estate in fee simple under a deed made by the mortgagee or trustee in pursuance of the powers conferred by the mortgage or deed of trust."

We wish to refer briefly to some authorities bearing upon the question of notice in condemnation proceedings, and first,

As Between Mortgagor and Mortgagee.

It seems to be universally admitted that a mortgagee of land taken for public use under eminent domain proceedings has some rights which a court will protect though there is some diversity of opinion as to the precise extent of those rights and as to the proper means for protecting them. As between the mortgagor and mortgagee the general rule is that the award takes the place of the land appropriated under the rule that when the

land is turned into money the mortgage becomes a lien upon the funds instead of the land.

Astor *v.* Miller, 2 Paige 68.

Consequently it has been held under a road proceeding the court will not award the damages assessed to the owner of the soil without first inquiring whether or not there are incumbrances, and if there are, an equitable distribution of the funds will be made.

Re Noble est., 1 Ashm. 276.

The jury should apportion the damages between the owners of the land and those having interests as mortgagees, liens or otherwise.

Rentz *v.* Detroit, 48 Mich. 547.

If the mortgagee seeks to appropriate the fund, it must be paid to him although he was not made a party to the condemnation proceedings.

Bright *v.* Platt, 32 N. J. Eq. 370.
Union Mut. L. I. Co. *v.* Slee, 123 Ill. 95.
Dodge *v.* Omaha & S. W. R., 20 Nebr. 281.
Chicago etc. *v.* Baker, 102 Mo. 560.

Where an award is made for land taken for a street and an assessment made on the remaining land for benefits, the award may be allotted to the mortgagee without deduction of the assessment and a decree rendered for foreclosure of the remaining property specifying the unpaid balance of the mortgage.

Hooker *v.* Martin, 10 Hun. 302.

But in this case, we wish to emphasize the fact, that the amount allowed as compensation for the land taken, was neither paid to the owner nor to the holder of the note, but was credited upon the assessment against the residue of the land. This contravenes every principle of the law.

As Between Mortgagee and Appropriator.

While there is a difference of opinion among the courts as to the steps necessary for an appropriator of private lands to take in order to protect himself, the authorities generally require notice and that view seems to be the one that accords with common sense and natural justice.

A railroad company can not obtain by proceedings under a statute greater rights than it can acquire as an innocent purchaser for value from the mortgagor.

Severin *v.* Cole, 38 Iowa, 463.
Wooster *v.* Sugar R. Co., 57 Wis. 312.

The taking authority must provide for the satisfaction of the mortgage.

Devlin *v.* New York, 131 N. Y. 127.

How Far a Mortgagee Must be Made a Party and Given Notice.

Expressions are found as broad as that the term "owner" includes every one having any title or interest in the land.

Baltimore & O. R. R. *v.* Thompson, 10 Md. 87.

The numerical weight of the cases in which the question has been passed upon recognizes the right of the mortgagee to notice and in many cases in which no opinion has been expressed on the point there seems to be an assumption that notice as to him was necessary.

In Simon *v.* Rhoades, 24 Minn. 25, the court said the interest of the mortgagee could have been bound by making him a party to the proceedings.

The requirement of notice to all parties in interest in the land to be taken, includes the mortgagee.

Warwick *v.* Providence, 12 R. I. 144.
State *v.* E. & A. R. Co., 36 N. J. L. 184.

Under a charter requiring notice to persons interested, if the mortgagee is not notified he will not be bound by the proceedings.

Platt *v.* Bright, 29 N. J. Eq. 128.
Re. N. Y. Central Co., 20 Barb. 419.

The same rule has been applied when the statute provides for notice to the "owner." The term "owner" is to be regarded as descriptive of the persons equitably entitled to receive compensation for damage rather than as designating the persons having a legal title to the land, and between the mortgagor and the mortgagee, the latter is entitled to the fund.

Danforth *v.* Suydam, 4 N. Y. 68.
Parks *v.* Boston, 15 Pick. 203.

A mortgagee is the owner in such a sense that he is entitled to notice of the assessment for damages for a right of way over the mortgaged property.

Severin *v.* Cole, 38 Iowa 463.

It is only by treating the mortgagee as having a right to notice that the statute can be upheld. Payment of the award to the mortgagor without notice to the mortgagee will not protect a corporation from being held liable to pay it to the mortgagee.

Sherwood *v.* Lafayette, 109 Ind.411.

The condemnation of property upon which there is a mortgage of record, without notice to the mortgagee and without his knowledge, will not affect his rights in the premises. The mortgagee's rights are protected by the constitutional provision that property shall not be taken for public use without compensation.

Dodge *v.* Omaha & S. R., 20 Neb. 281.

A mortgagee out of possession, whose mortgage is re-

corded, should be made a party to the proceedings of condemnation of the mortgaged property.

Wilson *v.* European & N. Co., 67 Me. 358.

If the mortgagee is not made a party to the proceedings, he will not be bound by the award.

Calumet River Co. *v.* Brown, 12. L. R. A. (Ill.) 84.
Bright *v.* Pratt, 32 N. J. Eq. 370.
Wade *v.* Hennessy, 55 Vt. 210.

Mortgagees are necessary parties to a suit to recover damages for the taking of property.

Davis *v.* LaCrosse, 12 Wis. 18.

Under the English statutes a mortgagee must be made a party and his rights provided for.

Rankin *v.* East I & W. Co., 12 Beav. 304.
Martin *v.* London, L. R. I. Eq. 145.

It is certainly the rule that notice must be given in jurisdictions where the common law doctrine relating to mortgages prevails, where the mortgagee is held to be the possessor of a defeasible title to the land.

In Mills on Em. Domain, Ed. 1888, Sec. 103, he says:

> "It has sometimes been doubted whether a mortgagee, not in possession, is entitled to notice. The better doctrine is that a mortgagee whose mortgage is recorded, is entitled to notice, although not in possession. The condemning party must see that the mortgagee is somehow paid or satisfied for the land taken, so far as covered by the mortgage. Without notice, a mortgagee might lose his entire security, by proceedings carried on without his knowledge or consent."

The lien of a judgment is different and a mere creature of legislation, as there can be no vested right in a remedy.

Watkins *v.* R. R., 47 N. Y. 157.

Lewis on Eminent Domain, Sec. 324, 2d Ed., says:

> "On the question whether mortgagees are necessary parties to condemnation proceedings, the authorities are not only conflicting but very unsatisfactory. The cases go almost entirely upon the language of the statutes as though it was a matter entirely within the control of the legislature. It seems to us that a mortgagee stands upon higher ground; that his interest in the land and the rights secured to him by his mortgage are property which cannot be taken from him without notice and an opportunity to be heard. Where a right of way is taken through a farm it may be a matter of slight consequence. But when an entire tract is taken, which is mortgaged for all it is worth and the compensation handed over to an insolvent mortgagor, it becomes a very serious matter. This looks very much like depriving a man of his property without compensation and without due process of law. All the courts agree that a mortgagee in possession must have notice. Those courts which hold that the mortgagee is divested without making the mortgagee a party also hold that the mortgage lien in equity follows the fund which is a substitute for the land and that the mortgagee may have it applied upon the mortgage debt. * * * A statute which requires all persons having an interest in lands to be made parties has been held to include mortgagees even in states which hold that mortgagees are not entitled to notice as owners."

It seems to us this review of the authorities correctly states the law. We firmly believe no case can be found, even in States where they hold that notice to mortgagees is not required, that do not require notice when the proceeds of the land condemned are not put in place of the mortgaged land taken and applied as a credit upon the mortgage debt. In this case it was applied as a credit upon the assessment against the residue of the land without paying the slightest regard to the outstanding deed of trust.

So we claim that the interest of the holder of the note secured upon this property was such that he was entitled to notice, and that if the statute itself is not considered as broad enough to require notice, it is itself invalid; and if it be considered as broad enough to require notice, then the proceeding is invalid, because the requirements of law were not met and notice was not given.

The law under consideration requires that notice shall be given to the "proprietor" of the property taken. This term is synonymous with the word "owner" and the same rule applies.

Am. & Eng. Enc., Vol. 23, p. 267.

If it be considered that this term does not include mortgagees or the holders of notes secured by deeds of trust, then it is invalid for the reasons stated.

As suggested by Mr. Mills in the quotation just made from his text book, in those States where it has been held that no notice need be given the mortgagee, they have treated it merely as a matter of construction of the statutes under which they were proceeding. But something else is required. Notice is essential, and if by any proper construction, the law itself fails to provide for notice, it is invalid; and if held to require notice, then this proceeding is invalid because no notice was given.

We therefore submit that the petitioner is entitled to question the validity of the taxes assessed against the lots covered by his trust and that the motion to quash should have been overruled and the respondent required to answer.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

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BRIEF FOR THE DEFENDANT

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BRIEF FOR THE DEFENDANT

STATEMENT OF THE CASE.

This is the second of two cases, chronologically considered, brought to set aside certain assessments made against lots 42 and 43, square 69, for the opening of a minor street known as "Newport Place," under the acts of July 22, 1892, and an amendment thereto of August 24, 1894. The first of these cases is that of Brandenburg *vs.* District of Columbia, immediately following the present case upon the calendar of this court.

These cases were argued together in the courts below and resulted in favor of the defendant.

The case at bar is based upon the same facts, under the same law, as the Brandenburg case, above referred to. In this case the plaintiff is the mortgagee, supposedly, and in the Brandenburg case the plaintiff is the owner of the property against which the assessments were levied. The appellant here, the mortgagee, claims that the proceedings are void because he was not given notice and brought into the proceedings resulting in the assessments which are the subject of attack in the Brandenburg case.

The first section of the act in question (*27* stat. *255*) is as follows:

"*Be it enacted, etc.* That the Commissioners of the District of Columbia be, and they are hereby, authorized to condemn, open, extend, widen, or straighten alleys in the District of Columbia upon the presentation to them of the plat of the alley to be condemned, opened, widened, extended, or straightened, accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, widened, extended, or straightened, or when the Commissioners of the District of Columbia shall certify that the preservation of peace, good order, and public morals require any such alley shall be opened, extended, widened, or straightened, or when the Health Officer of said District shall certify that such opening, extension, widening, or straightening of an alley is necessary for the public health; provided, that in the opening, extension, widening or straightening of an alley, the fee of which is in the United States which may thereby become useless or unnecessary; and its hall also, in like manner, be lawful to close any other alleys or parts of alleys the title thereto to revert to the person or persons who dedicated the same for alley purposes, or their assigns."

Section 6 of the same act provides for notice to "each proprietor of land in the square designated."

The act of August 24, 1894, (28 stats. 501) amending the act of July *22*, 1892, authorizes the Commissioners

"To open minor streets in said district of a width of not less than forty feet, nor more than sixty feet, to run through a square from one street to another, whenever in the judgment of said Commissioners the public interest shall require it."

ARGUMENT:

The only question in this case, argued below, was whether the proceedings being valid as against Brandenburg, the owner, were void as against the mortgagee, the appellee here, because of want of notice to him and failure to bring him into the proceedings.

It will be noticed that the statute provides for notice "to each proprietor of land in the square designated." There is no provision for notice to any other person or persons, and if such notice be required it must be by virtue of some well established rule of law which obtains in actions brought by the sovereign authority in the exercise of its right of eminent domain.

No such well established rule is to be found among the authorities.

Lewis, on Eminent Domain, says, Section 324:

"On the question whether mortgagees are necessary parties to condemnation proceeding, the authorities are not only conflicting but very unsatisfactory. The cases go almost entirely upon the language of the statutes as though it was a matter entirely within the control of the legislature. It seems to us that a mortgagee stands upon higher ground, that his interest in the land and the rights secured to him by his mortgage are property which cannot be taken from him without notice and an opportunity to be heard. Where a right of way is taken through a farm it may be a matter of slight consequence. But, when an entire tract is taken which is mortgaged for all it is worth, and the compensation handed over to an insolvent mortgager, it becomes a very serious matter. This looks very much like depriving a man of his property without compensation and without due

process of law. In our opinion a mortgagee is entitled to notice as a matter of right, and, if not made a party, his rights will remain unaffected."

* * * * *

"Those courts which hold that a mortgage is divested without making the mortgagee a party also hold that the mortgage lien in equity follows the fund which is a substitute for the land and that the mortgagee may have it applied upon the mortgage debt, even though the debt is not due. * * * A statute which requires that all persons having an interest in lands to be made parties, has been held to include mortgagees even in States which hold that the mortgagees are not entitled to notice as owners."

The cases *pro* and *con* are collected in the notes to the above citation.

The learned writer admits that the cases follow the language of the statutes in the various States, although he himself is of the opinion that this should not be done. It is interesting to note, however, that none of the reasons assigned by the author for a doctrine contrary to the weight of authority, applies in the present case; and this would seem to be, *prima facie* a rather significant test of the soundness of the author's views, at least so far as they are concerned herewith.

First,—All of the tract has not been taken, but only a small part thereof. The bulk of the tract remains intact as security for the money loaned; and, in the opinion of the jury called in this case, the remainder of the tract has been greatly enhanced in value.

Second,—No compensation has been paid to the owner. On the contrary, the jury has found that the benefits accruing to the property by the opening of this minor street exceed the damage caused by taking a part of the land, and, therefore, assessments are laid to make up for this difference.

Third,—There is no allegation that the mortgagor is insolvent. If any presumptions are to be indulged, the Court will presume that the mortgagor is able to meet the debt which he has contracted.

As to the question of notice, again, the better opinion seems to be that a mortgagee is not entitled to notice.

7 Am. & Eng. Enc. Pl. & Pr. 488-9, notes.

Therefore, he should not be made a party.

In the foregoing citation, a remark will be found in the notes to the effect that if the mortgagee is recorded, then the mortgagee is entitled to notice. This seems to be in conflict with what has been cited from Lewis, on Eminent Domain.

In support of this, three cases are referred to.

The first, Wilson *vs.* R. R., 67 Me. 358, was an action of trespass brought against a railroad company. The second, Anderson, *vs.* Buchanan, 20 Neb. 281, was an action to foreclose a mortgage, and the third, Gray *vs.* Case, 51 N. J. Eq. 427, was a bill in equity to establish a mortgage as a lien prior to the condemnation proceedings. All were actions against railroad companies which had instituted condemnation proceedings by virtue of the authority contained in their charters, or under authority of an act of the legislature. In none of them was there an attempt to set aside the proceedings as void for want of notice, as is attempted to be done in the present case.

As opposed to the above view there are authorities going to show that notice to a mortgagee out of possession is not necessary.

Parish *vs.* Gilmanton, 11 N. H. 293.
Schumacher *vs.* Toberman, 56 Cal. 508.
Rand *vs.* Fort Scott, 50 Kan. 114.
Chicago &c. R. R. *vs.* Bank, 52 Kan. 467.
Chicago *vs.* Sheldon, 53 Kan. 169.

In Watson *vs.* R. R., 47 N. Y. 157, it was held that a judgment creditor was not an owner of land within the meaning of a statute authorizing condemnation proceedings.

In the cases holding that mortgagees are entitled to notice it will be seen that the proceedings were between the parties after the condemnation proceedings were finished, and that there was no attempt in in any of them to disturb the right of eminent domain so exercised.

The law as it now stands, Code of Laws for the District of Columbia, sec. 1608 (Act Feb. 23, 1905), provides for notice by advertisement to "all persons having any interest in the proceedings," * * * "and in addition to such public, said court, whenever in its judgment it is practicable to do so, shall cause a copy of said notice to be served * * * upon such owners of the fee of the land *to be condemned* as may be found * * * within the District of Columbia."

This would seem to be a legislative recognition of the rule that where "persons interested" are not mentioned, they are not entitled to notice, but only the owners or proprietors.

As to whom the compensation should be paid, the courts also disagree. 10 Eng. & Am. Enc. 1192-3.

It is true that the mortgagee has his security reduced in the amount of the land mortgaged; but he has a greater security in the increased value of the land remaining. He has had his security diminished, also, by the formation of a lien prior to his. But this is a case of *damnum absque*

injuria and must always arise where the legislature assesses the damages back upon the land by the way of benefits received, and no case has been cited that makes it illegal for the legislature to do so. Moreover, the mortgagee has still his remedy against the mortgagor and it does not appear that that remedy is fruitless. Neither does it appear nor is it anywhere alleged, that the market value of the land remaining to the owner is not equal to both the liens.

The mortgagor, certainly, has no greater or superior right than the owner of the land taken. If these proceedings are quashed on behalf of the owner, then the mortgagee has nothing to complain of. If the owner fails to establish the unconstitutionality of the law, or the irregularity of the proceedings, then it is difficult to perceive what higher authority the mortgagee has to take that task on himself.

So far as the present case is concerned, the discussion of the question relating to notice to mortgagees in cases of this kind, seems to be purely academic.

It was assumed in the argument at the first trial below, there were two trials, that the plaintiff-in-error, Martin, was the mortgagee of the premises assessed at the time of the condemnation proceedings which resulted in the opening of the said minor street and the assessment of this property for benefits, and the holder of the note secured by that mortgage. There is nothing in the petition filed in this case by the plaintiff-in-error, Martin, to show what right, if any, he has in the proceedings, or had at the time they were instituted and were in progress, or by what authority, direct or indirect, he complains of any want of notice to any party or parties interested.

The petition shows, paragraph one, record page one, that the title was conveyed to Job Barnard and James S. Edwards, trustees, to secure the payment of money loaned by Florence E. Edwards, guardian. There is no allegation in any part of the petition that shows any interest in Martin,

either as principal or agent at the time the proceedings were begun or in progress. Paragraph two of the said petition shows that the said Florence E. Edwards, guardian, was at the time the said proceedings for the opening of the said minor street were had, the owner and holder of the note. The petitioner further alleges that he "is now" (the petition was filed June 1, 1904) the owner and holder of the said note. The petitioner does not disclose when he became the holder of the note, but only that it was after the condemnation proceedings in question were had.

In paragraph 12 of the petition, record page 4, (e) and (f), the plaintiff-in-error complains of want of notice to Florence E. Edwards, at that time the holder of the note.

In short, the plaintiff-in-error became the owner of this note after the proceedings were had for the opening of the said minor street and with full notice thereof. These proceedings were *in rem* and became a matter of public record. The petitioner was bound by them and bound to take notice of what had transpired in regard to the property, and cannot now be heard to complain of any want of notice to a previous holder of the note. It is insisted here, as it was below, that the plaintiff-in-error has no standing to attack the proceedings involved in the assessment of the land upon which his note is secured.

The Court of Appeals took this view of the controversy and this was its principal reason for its opinion adverse to the plaintiff-in-error. Record, page 9. The Court also decided the question of notice adversely to the petitioner. It is the opinion of counsel, however, that argument and decision upon the question of notice were both unnecessary.

Respectfully submitted,

EDWARD H. THOMAS,
FRANCIS H. STEPHENS,
Attorneys for Defendant.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 191.

CLARENCE A. BRANDENBURG, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 26, 1906.

(20,067.)

(20,067.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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1 In the Court of Appeals of the District of Columbia.

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Supreme Court of the District of Columbia.

No. 42961. At Law.

CLARENCE A. BRANDENBURG, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Respondent.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

Amended Petition.

Filed June 3, 1904.

In the Supreme Court of the District of Columbia.

In Certiorari. At Law. No. 42961.

CLARENCE A. BRANDENBURG, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Respondent.

To the justice of the supreme court of the District of Columbia, holding a special term at law:

The amended petition of Clarence A. Brandenburg with leave of court first had and obtained, respectfully showeth:

I. That he is the owner in fee simple and possessed of sub-lots 42 and 43, by the full depth thereof in square numbered 69 in the city of Washington, District of Columbia, as shown on the ground plan of said city, the same abutting 20.43 and 20 feet respectively on an alley running east and west in said square and running back, the same width, to the depth of 75 feet.

2 II. That by an act of Congress approved July 22, 1892, the Congress of the United States undertook to authorize the Commissioners of the District of Columbia to condemn, open, widen, or straighten alleys, in the District of Columbia upon com-

pliance with the terms and conditions of said act, and to authorize the collector of taxes of said District to levy a tax upon each lot or part of lot benefited by the opening, widening, extending, etc., of such alley.

III. In and by an act of Congress approved August 24, 1894, said act of Congress approved July 22, 1892, was amended so far as to "authorize the Commissioners of the District of Columbia, under the terms and conditions of said act, * * * to open minor streets in said District of a width of not less than forty feet, nor more than sixty feet, to run thro ıgh a square from one street to another, whenever in the judgment of said Commissioners the public interest require it."

IV. That thereafter, to wit, in the month of February, 1898, pursuant to an application in writing of the Commissioners of the District of Columbia, and purporting to be made pursuant to the authority attempted to be conveyed by the act of Congress aforesaid, the marshal of the District of Columbia, summoned a jury of twelve persons, "to ascertain the damages which may (might) accrue to any individual or individuals" by the opening of a street in said square 69, to be known as Newport place, by the widening of the 30 foot alley running east and west in said square to a width of 60 feet and the extension of the same by the latter width through said square from 21st to 22nd streets which said streets bounded said square on the east and west sides thereof respectively.

V. That such proceedings were thereafter had, that said jury so impanelled, presided over by the marshal's deputy, and not under the supervision of any judicial tribunal, thereafter, to wit, on the 17th day of March 1898 made its award and finding, whereby they undertook to condemn for the purposes of said street a part of said sub-lots 42 and 43, that is to say, 40 feet 3 inches, the width thereof, fronting upon said purposed street, by a depth of 15 feet, or one-fifth of the total area thereof, and the respondent, pursuant thereto, has taken actual possession and control thereof for the purposes of said street.

VI. That in said proceedings the jury undertook to allow as the value of the land so taken, $92 for said part of sub-lot 42 and $75. for said part of sublot 43; that said amounts were never paid nor tendered to be paid but the respondent has sought to deduct the amounts thereof from the total amounts of the tax apportioned against the portions of said sub-lots remaining.

VII. That in said proceedings said jury apportioned an amount equal to the amount of damages awarded for the land condemned including the expenses of the proceeding, among the several lots in said square, of which amount they charged against the remainder of said lot 42 the sum of $650, less the sum of $82, the value
3 of the portion taken, and against the remainder of said lot 42 the sum of $550 less the sum of $75. the value allowed for the portion thereof taken.

VIII. That no right of revision or review — said finding of said jury existed, and thereafter, the respondent attempted to levy as a tax or charge against said sub-lots, under the provisions of the acts

of Congress heretofore mentioned, the amounts so fixed by the said jury, that is to say, the sum of $650 less $92 against said sub lot 42 and $550 less $75 against said sublot 43, which said sums are carried on the books of the respondent as taxes against said lots, and because of the non-payment thereof, the respondent threatens a sale thereof.

IX. Your petitioner avers that said charges or taxes and each of them are void and illegal, that said Commissioners were not authorized by said acts of Congress or either of them, or by any other law or part of law, to open a minor street in said square, or to levy a tax or charge in the manner, in which said "minor street" was opened and said taxes or charges were levied.

X. Your petitioner respectfully charges that the acts of Congress under which the proceedings aforesaid were had and pursuant to which the respondent undertook to levy the taxes aforesaid against the lots aforesaid, were and are unconstitutional and void, because they provide for the taking of private property for public uses without making just compensation and without due process of law, in this: 1. That they do not provide for the giving of notice of the proposed taking; 2. In that they provide for the apportionment of the total amount of the damages awarded for the land condemned together with the expenses of the proceedings, among the lots in the square through which the proposed street or alley is to be opened, without regard to the actual benefits; 3. In that they limit the area of assessment to such particular square, without regard to the benefit to adjacent squares, and without regard to the fact that the actual benefits to the square improved may not equal the total cost of improvement; 4. Because they arbitrarily require the assessment of such total cost to the particular square improved, without a legislative determination of the actual benefits or the area benefited, such determination being impossible because said laws are general in nature and were passed without a legislative consideration of the particular improvement, the same not being in contemplation at the time, but arising subsequently.

XI. Your petitioner further avers that the records in custody of the respondent show numerous irregularities and illegalities in the supposed levy of said charges, among which are the following:

(*a.*) That said Commissioners did not, nor did any one else, open or authorize the opening of any minor street in said square, but that they widened and extended a thirty foot alley theretofore existing in said square, without any authority whatsoever so to do but levied said taxes for the opening of a minor street.

(*b.*) That no plat of any minor street to be opened ac-
4 companied by a petition of the owners of more than one-half of the real estate in the square aforesaid was presented to the Commissioners. That the petition presented related to widening an alley and not to opening a minor street and was signed by thirty-six persons who did not own more than half of the real estate in said square and by a trustee who was not authorized by his beneficiaries to sign and who had no power to sign said petition. That the total number of square feet in said square was, to wit: 210,266.80, and

the petition presented to the Commissioners of the District as aforesaid was not the petition of the owners of more than one-half of the real estate in said square.

(*c.*) That it does not appear that the Commissioners of the District of Columbia certified that the preservation of peace, good order and public morals, required that any such alley or minor street should be opened, extended, widened or straightened.

(*d.*) That it does not appear that the health officer of said District certified that such opening, widening or extending was necessary for the public health.

(*e.*) That the value of the land taken or fixed by said jury was twenty-five cents per square foot, while the amount of assessments apportioned against the same was twice as much, to wit, fifty cents per square foot; and petitioner expressly charges that said assessment is more than fifty per cent. in excess of the actual benefits and in itself, was at the time of the levy thereof, and still is in itself in excess of the value of the land in said lots.

(*f.*) That there was not in fact any ascertainment by said jury of actual benefits; on the contrary, there was only an apportionment of the damages awarded in said proceedings and the costs thereof, among the lots in said square.

XII. Petitioner further says that after the proceedings hereinbefore mentioned were had, there were certain further sums, aggregating a large amount, assessed against said lots, of ground under the guise of street improvements, curbing and water main all of which taxes were illegally assessed against said property as street improvements under the laws conferring authority to levy taxes for the improvement of streets, whereas your petitioner avers that legally there never was and is not such a street as Newport place, the proceedings under which an attempt was made to create the same being null and void for the reasons hereinbefore set forth.

XIII. Your petitioner avers that he did not request said work to be done, but repeatedly protested against the same, that he did not sign any petition presented to the Commissioners, that said opening of said minor street, if any such there be, does not in any wise benefit him or his land; that said charges are unpaid, and the respondent now threatens to sell and to convey your petitioner's said parcels of land in order to satisfy said unlawful charges, whereby the title of your petitioner is clouded and he is injured and has no appeal.

5 Wherefore he prays:

First. That a United States writ of certiorari may issue from this court commanding the District of Columbia to certify immediately to this court a copy of each and every record and part of record in its custody relating in any manner to charges and taxes made against any part of sub-lot 42 and sub-lot 43, in square 69, city of Washington, District of Columbia, and purporting to be charges or taxes levied under the authority of acts of Congress approved July 22, 1892 and August 24, 1894 or either of them, together with a full and true copy of any petition by owners of property in said square, made to said Commissioners, and a full

copy of every assessment charge or tax made or purporting to be made for either benefits or damages to any owner or owners of property in said square, together with a copy of all advertisements, measurements, computations, surveys, assessments, notices of assessment to proprietors and returns of manner of service of any such notice: also true copies of all records relating to any special improvement, taxes assessed against said lots since the opening of said Newport place.

Second. That upon the coming in of said returns, the said alleged assessments or charges may be quashed and annulled by the judgment of this court.

CLARENCE A. BRANDENBURG.

BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof, that the matters and things therein set forth of my own knowledge are true, and those set forth upon information and belief, I believe to be true.

CLARENCE A. BRANDENBURG.

Subscribed and sworn to before me this 16th. day of May, A. D. 1904.

H. J. SWEENEY,
[SEAL.] *Notary Public, D. C.*

Endorsed.

June 3, 1904.—Leave granted to file amended declaration and the clerk is directed to let the writ issue as prayed.

JOB BARNARD, *Justice.*

6 *Return of Respondent.*

Filed September 8, 1904.

In the Supreme Court of the District of Columbia.

In Certiorari. At Law. No. 42961.

CLARENCE A. BRANDENBURG, Petitioner,
v.
THE DISTRICT OF COLUMBIA, Respondent.

And now comes the respondent, The District of Columbia, and for return to the writ of certiorari issued in the above entitled cause, *and* certifies to the court true and accurate copies of notice of special assessment against sublots 42 and 43, in square 69, in the District

of Columbia, in the matter of the opening "Newport place," in said square, together with true and accurate copies of the return of service *to* said notice of assessment.

Your respondent prays that its return in the case of Allison Nailor, Jr., *vs.* The District of Columbia, at law, No. 42,837, and its return in the case of Elizabeth McClellan *vs.* The District of Columbia, at law, No. 43,944, may be referred to at the hearing of this cause, and taken as part of its return to the writ of certiorari issued herein.

And on the return hereby made, the respondent prays that the said writ of certiorari issued herein may be quashed and the petition filed herein dismissed.

THE DISTRICT OF COLUMBIA,
By F. H. STEPHENS, *Its Attorney.*

Petition of Property Owners.

Filed July 19, 1900.

WASHINGTON, D. C., *December* 23, 1897.

The undersigned owners of real estate in square numbered sixty-nine (69) in the city of Washington, District of Columbia, to-wit:—the lots or parts of lots enumerated after our respective signatures, do hereby severally and jointly petition the Commissioners of the District of Columbia that the alley thirty feet in width running east and west in said square numbered sixty-nine (69), be widened to the width of sixty (60) feet and be extended or opened to the full width of sixty feet, through said square from Twenty-first street west to Twenty-second street west, as shown and marked in red lines upon the plat of said square herewith submitted and marked "Exhibit N," as a minor street to be known as "Newport place" to be done under and by virtue of, and in the manner prescribed by an act of
7 Congress entitled "An act to open, widen and extend alleys in the District of Columbia" approved July 22, 1892, and an act entitled "An act to open, widen and extend alleys in the District of Columbia, approved August 24th, 1894, the cost thereof, including the benefits less the sum to be deducted for parts of alleys to be closed as shown and indicated upon said plat (by the letters B, C, D, E, F, respectively, thereby rendered useless and unnecessary), to be assessed against the property benefitted thereby and abutting thereon: And further, that in the widening, extending and opening of said alley, or minor street, as aforesaid, the parts of the original alleys in said square designated upon said plat by the letters B, C, D, E, and F, respectively, thereby rendered useless and unnecessary be closed, and the land therein contained be sold and disposed of by the Commissioners of the District of Columbia, in the manner provided for by the first hereinbefore mentioned act, the amount of the proceeds thereof to be applied in the reduction of the

amount to be assessed against the property benefitted, as the cost of the opening of the minor street, as aforesaid.

Very respectfully,

E. B. JONES,
Executrix Est. Mary E. Jones, Dec.
G. B. MOSS,
By G. W. MOSS, *Att'y.*
J. M. JOHNSON, *Trustee.*
W. L. BRAMHALL, *Trustee.*
R. L. BRITTON, *Trustee.*

Certificate of Assessor, D. C.

Filed July 19, 1900.

I hereby certify that the records of the assessor's office of the District of Columbia, show that on December 23, 1897, square numbered sixty-nine (69) in the city of Washington in said District contains 181,047 square feet of land, and that on the above date, the persons whose signatures are appended to the petition asking for the condemnation of land necessary to widen and extend alley in said square, to a width of sixty (60) feet, to be known as "Newport place," appear to be the owners of 121,255 square feet of land in said square.

(S'g'd) MATTHEW TRIMBLE,
Assessor, D. C.

Official copy.
W. TINDALL,
Secretary B'd Com's, D. C.

(Copy.)

Certificate of U. S. Marshal to Commissioners.

Filed July 19, 1900.

To the honorable Board of Commissioners of the District of Columbia:

In the matter of the proposed opening of Newport place by the widening of the thirty foot alley running east and west in
8 square No. 69, to a width of sixty feet, and the extension of the same at the latter width through said square from 21st to 22nd streets, according to the law in such cases made and provided, I caused to be served on the owners of the property affected the following notice in the manner hereinafter designated, to wit:

UNITED STATES MARSHAL'S OFFICE,
WASHINGTON, D. C., *Feb.* 16, 1898.

To —— ——:

The Commissioners of the District of Columbia having made application in writing to me to summon, in pursuance of law, (see acts

of Congress of July 22nd, 1892 and August 24, 1894), a jury of twelve disinterested citizens to ascertain the damages which may accrue to any individual or individuals by the opening of Newport place as above stated, in accordance with the plan and petition therein enclosed, you are hereby notified that the said jury so directed to be summoned as aforesaid will meet to assess the said damages as aforesaid at the south-west corner of 21st and O Sts. northwest, in this city on the 3rd day of March, 1898, at 11 o'clock a. m.

Very respectfully, AULICK PALMER, *Marshal.*

(Copy.)

Order of Commissioners.

Filed July 19, 1900.

OFFICES OF THE COMMISSIONERS
OF THE DISTRICT OF COLUMBIA,
WASHINGTON, *February* 1, 1898.

Ordered: That application is hereby made to the marshal of the District of Columbia to summon and impanel a jury to ascertain and apportion the damages and assess the benefits due to the widening of the thirty-foot alley running east and west in square 69 to a width of sixty feet and the extension of the same at the latter width through said square from 21st to 22nd streets, as per plat enclosed, as a minor street to be known as Newport place, as provided for in the act "to provide for the opening of alleys in the District of Columbia," approved July 22", 1892, and the amendment thereto approved August 24, 1894.

(Signed) JOHN W. ROSS,
(Signed) JOHN B. WIGHT,
(Signed) W. M. BLACK,
Commissioners of the District of Columbia.

9 (Copy.)

Return of Service by Marshal.

Filed July 19, 1900.

Served the foregoing notice on the following named individuals by delivering to each in person a copy thereof February 16th, 1898:
Clarence A. Brandenburg.

* * * * * * *

AULICK PALMER,
United States Marshal, District of Columbia.

(Copy.)

Oath of Jurors.

Filed July 19, 1900.

UNITED STATES OF AMERICA, *District of Columbia:*

We, the undersigned, being a jury of 12, summoned and empanneled by the marshal of the District of Columbia, upon the application of the Commissioners of said District, to ascertain and apportion the damages and assess the benefits due the owners by the widening of the 30 foot alley running east and west in square 69 to a width of 60 feet, and the extension of the same at the latter width through said square from 21st to 22nd streets as a minor street to be known as Newport place, city of Washington, District of Columbia, do solemnly swear on our several oaths that we will faithfully, impartially and without favor and to the best of our judgment ascertain and appraise the damages and benefits which may accrue to each owner of real estate in said square, or to any person or persons by reason of said land or any part thereof being taken by the District of Columbia for the opening of said street according to the plat thereof made by the surveyor of the District of Columbia.

A. D. HAZEN.	[SEAL.]	J. J. HOGAN.	[SEAL.]
HENRY F. BLOUNT.	[SEAL.]	N. H. SHEA.	[SEAL.]
E. SOUTHERD PARKER.	[SEAL.]	C. C. BRYAN.	[SEAL.]
JOHN C. POOR.	[SEAL.]	ROBERT B. TENNY.	[SEAL.]
CONRAD BECKER	[SEAL.]	R. W. HENDERSON.	[SEAL.]
MONTGOMERY BLAIR.	[SEAL.]	GEORGE GIBSON.	[SEAL.]

Subscribed and sworn to before me this fourth day of March, 1898.

JOHN R. YOUNG, *Clerk.*

10 *Certificate of Inquisition.*

Filed July 19, 1900.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

In re "NEWPORT PLACE," in Square 69, in the City of Washington, District of Columbia.

An inquisition of damages, taken in the District of Columbia, on the 17th day of March, A. D. 1898, before Aulick Palmer, Esq., United States marshal for said District, on the oaths of Abram D. Hazen, Henry F. Blount, E. Southerd Parker, John C. Poor, Charles C. Bryan, Nicholas H. Shea, Montgomery Blair, John J. Hogan,

George Gibson, Robert B. Tenny, Conrad Becker and Richard W. Henderson, being a jury of 12 citizens who have no interest in the real estate mentioned in this proceeding, summoned and impanneled by said marshal on application in writing to him by the Commissioners of said District, to ascertain and appraise the damages which may accrue to the real estate of any person or persons by the opening of a minor street to be known as Newport place, through square number sixty-nine (69) in the city of Washington, in the District of Columbia, and the closing of alleys in said square as shown on triplicate plats of said square, showing said minor street to be opened, and alleys to be closed, prepared by the surveyor of said District, one of which plats was by him filed in the office of the Commissioners of the District of Columbia, one by him deposited with the recorder of deeds to be filed among the records of his office, and the remaining one kept in the office of said surveyor.

And the undersigned, the jurors aforesaid, having first taken and subscribed an oath in writing justly and impartially to discharge the duties imposed on them by the provisions of an act of Congress approved July 22nd entitled "An act to provide for the opening of alleys in the District of Columbia," and of an act amendatory thereof, approved August 24th, 1894, entitled "An act to open widen and extend alleys in the District of Columbia," and having entered upon said square, and viewed and examined the several lots of ground and improvements affected by the opening of said minor street and closing of said alleys, and having heard evidence introduced before us by parties interested, upon our oaths do say, we ascertain, appraise and value the damages which may accrue to the real estate of any person or persons by the opening of said minor street and the closing of said alleys, said several amounts of damages being the value of the respective parcels of land at the time
11 of the taking, viz:

Square.	Lot.	To whom assessed.	Feet taken.	Damages.
*	*	* * *	*	*
69	Sub-lot 43	Clarence A. Brandenburg...	300 sq. ft.	$75.00
69	Sub-lot 42	Do. ...	304.95 sq. ft.	92.00
*	*	* * *	*	*

And, we, the jurors aforesaid, hereby apportion the amount of said damages, so ascertained and appraised by us aforesaid, including $20 for the services of said marshal and $60 for the services of said jury, less the sum of $3298.13, agreed to be paid to the District as assessments against the property adjoining alleys closed, marked B, C, D, E, & F, on the plat filed in this cause by the parties taking the same.

$3298.13

$22687.87

In witness whereof, we the jurors aforesaid, have hereunto set our respective hands and seals this 17th day of March, 1898, A. D.

A. D. HAZEN.	[SEAL.]	MONTGOMERY BLAIR.	[SEAL.]
HENRY F. BLOUNT.	[SEAL.]		
E. SOUTHERD PARKER.	[SEAL.]	J. J. HOGAN.	[SEAL.]
		GEO. GIBSON.	[SEAL.]
JOHN C. POOR.	[SEAL.]	ROB'T B. TENNY.	[SEAL.]
CHARLES C. BRYAN.	[SEAL.]	C. BECKER.	[SEAL.]
N. H. SHEA.	[SEAL.]	R. W. HENDERSON.	[SEAL.]

WASHINGTON, D. C., *March 17th*, 1898.

I hereby certify to the foregoing inquisition and return the same to the Commissioners of the District of Columbia.

AULICK PALMER,
United States Marshal for the Dist. of Columbia.

Square.	Lot.	To whom assessed.	Amount of benefits.
* * *	*	* * *	*
69	Sub lot 6	Clarence A. Brandenburg...	$110.00
69	Sub lot 7	Do. ...	140.00
69	Sub-lot 42	Do. ...	650.00
69	Sub-lot 43	Do. ...	550.00
* * *	*	* * *	*

In witness whereof, we the jurors aforesaid, have hereunto set our respective hands and seals this 17th day of March 1898, A. D.

A. D. HAZEN.	[SEAL.]	MONTGOMERY BLAIR.	[SEAL.]
HENRY F. BLOUNT.	[SEAL.]		
E. SOUTHERD PARKER.	[SEAL.]	J. J. HOGAN.	[SEAL.]
		GEO. GIBSON.	[SEAL.]
JOHN C. POOR.	[SEAL.]	ROB'T B. TENNY.	[SEAL.]
CHARLES C. BRYAN.	[SEAL.]	C. BECKER.	[SEAL.]
N. H. SHEA.	[SEAL.]	R. W. HENDERSON.	[SEAL.]

12 WASHINGTON, D. C., *March 17th*, 1898.

I hereby certify to the foregoing inquisition and return the same to the Commissioners of the District of Columbia.

AULICK PALMER,
United States Marshal for the District of Columbia.

Assessment of Benefits.

Filed July 19, 1900.

Assessment of benefits apportioned by the jury of condemnation in the matter of the minor street called "Newport place," in square 69, in the city of Washington, District of Columbia, opened under act of Congress of July 22, 1892, as amended by act of Congress of August 24th, 1894.

Square.	Lot.	Name of owner.	Benefits.	Damages awarded by jury to be deducted.	Amount due.
			Dolls. Cts.	*Dolls. Cts.*	*Dolls. Cts.*
*	*	* * *	*	*	*
69	Sub. 42	Clarence A. Brandenburg....	650.00	92.00	558.00
69	Sub. 43	Clarence A. Brandenburg....	550.00	75.00	475.00
*	*	* * *	*	*	*
			$22687.87	$25906.00	$20593.87

February 23rd. 1899.
(Signed)

E. G. DAVIS,
Collector of Taxes, District of Columbia.

Motion to Quash Return.

Filed February 24, 1905.

In the Supreme Court of the District of Columbia.

No. 42961. Law.

CLARENCE A. BRANDENBURG
vs.
THE DISTRICT OF COLUMBIA.

Now comes the petitioner, by his attorneys, and moves the court to quash the return of the respondent filed herein, and for judgment quashing the taxes complained of in the petition notwithstanding such return.

C. A. BRANDENBURG,
Attorneys for Petitioner.

13 Supreme Court of the District of Columbia.

FRIDAY, *May* 19, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

At Law. No. 42961.

CLARENCE A. BRANDENBURG, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

Upon hearing the petition, the writ of certiorari, and the return of the defendant thereto, and the motion of the petitioner to quash the return of the defendant and for judgment quashing the taxes complained of, it is considered that said motion be, and the same hereby is, overruled and judgment dismissing the petition ordered: Therefore it is considered that the writ of certiorari be, and hereby is quashed and for nothing held, and that the petition be, and hereby is dismissed at the costs of the petitioner.

The petitioner notes an appeal to the Court of Appeals, and the bond of costs is hereby fixed at $100.00.

Memorandum.

May 31, 1905.—Appeal bond filed.

Designation of Record.

Filed June 9, 1905.

In the Supreme Court of the District of Columbia.

No. 42961. Law.

CLARENCE A. BRANDENBURG
vs.
DISTRICT OF COLUMBIA.

To the clerk of said court:

We hereby designate the following portions of the record herein to be included in the transcript on appeal, in accordance with rule V, paragraph 1, section *g:*

1. The amended petition for writ of certiorari.
2. The return of respondent.
3. The following portions of the return in McClellan *vs.* District of Columbia, No. 43,944, made part of return herein.

(*a.*) Petition of property owners dated Dec. 23, 1897, omitting all

signatures except those of E. B. Jones, B. B. Moss, J. M. Johnson, trustee, W. L. Bramhall, trustee and R. L. Britton, trustee.

(*b.*) Certificate of assessor attached to said petition.

(*c.*) Certificate of marshal to Commissioners dated Feb. 16, 1898.

(*d.*) Order of Commissioners dated Feb. 1, 1898.

14 (*e.*) Return of service by marshal, omitting all names except "Clarence A. Brandenburg."

(*f.*) Oath of jurors.

(*g.*) Certificate of inquisition, omitting all items in the schedules attached thereto, except the headings, the assessments against Clarence A. Brandenburg, the certificate of the jurors.

(*h.*) The assessment by the assessor, omitting all except the caption, the assessment against Clarence A. Brandenburg, and the signature of the assessor.

4. Motion to quash return.

5. Judgment quashing writ.

BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

To the attorneys of the District of Columbia.

GENTLEMEN: In accordance with the rules of court, we hand you herewith a copy of the designation of the parts of the record that we consider necessary to a proper hearing of this case on appeal.

Very respectfully,
BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

Service of copy acknowledged this 9th day of May, 1905.
A. B. DUVALL,
F. H. STEPHENS,
Att'y- for D. C.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 23, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 42,961, at law, wherein Clarence A. Brandenburg is petitioner, and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 17th day of July, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme Court. No. 1586. Clarence A. Brandenburg, appellant, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Jul- 18, 1905. Henry W. Hodges, clerk.

15 THURSDAY, *October 5th, A. D.* 1905.

No. 1585.

THOMAS R. MARTIN, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

and

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

The argument in the above entitled causes was commenced by Mr. E. C. Brandenburg, attorney for the appellant-, and as continued by Mr. F. H. Stephens, attorney for the appellee, and was concluded by Mr. E. C. Brandenburg, attorney for the appellants.

16 No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
v.
THE DISTRICT OF COLUMBIA.

Opinion.

Mr. Justice DUELL delivered the opion of the Court:

This is an appeal from the judgment of the court below overruling the motion of petitioner to quash the return of the respondent to the writ of certiorari, issued herein, and dismissing the petition.

It appears that appellant, at the time of the proceedings complained of, was, and still is, the owner in fee of certain lots known as 42 and 43 in square 69, in the District of Columbia.

By an act of Congress, approved July 22, 1892, the District Commissioners were authorized to open and extend alleys, and by an amendatory act, approved August 24, 1894, its terms were extended to authorize the opening of minor streets. Pursuant to the provisions of said acts, the Commissioners of the District of Columbia, upon the request of the claimed owners of more than one-half of the land in the square, in February, 1898, applied in writing to the marshal of the District to summon a jury to condemn the land necessary for widening a thirty-foot alley in square 69 to a width of sixty feet, and to apportion the damages and assess the benefits thereof as provided for in said acts. The minor street so to be created to be known as Newport Place. The marshal summoned a jury of twelve disinterested citizens and notified the owners

of the property to be affected, among whom is, this appellant, who is named as having been served with a copy of the notice, which specified the time and place of the meeting of the jury.

The jury, having subscribed and sworn to the oath required, proceeded to discharge the duties imposed upon them and duly certified their proceedings, which, in turn, were certified by the marshal and returned to the District Commissioners. The award and finding of the jury, so far as relates to the appellant's lots, shows that they assessed the value of the land taken at 25 cents per foot, amounting to $92 for sublot 42 and $75 for sublot 43. The jury charged against the parts of the two lots remaining as benefits at the rate of 50 cents per foot, or a total of $650 and $550, respectively, and deducting the sums allowed for the parts taken, found the amounts due to be, respectively, $558 and $475. Pursuant to the findings of the jury, the District assessor leviel these amounts against the residue of the two lots.

The District of Columbia made a return to the writ of certiorari, and prayed that it be quashed and the petition denied. A hearing was had, which resulted, as stated, in a denial of appellant's motion to quash the appellee's return and for judgment quashing the taxes complained of, and dismissing the petition for the writ. This action of the court below is assigned as the error in the case. It is urged on behalf of appellant, 1st, that the act of Congress under which the proceedings were had is unconstitutional, and 2d, that the proceedings had were not in accordance with law.

17 1. It is urged that the act is unconstitutional, because it provides for taking private property for public use without just compensation and without due process of law; because it provides for the apportionment of the total amount of damages awarded for the lands condemned, with the expenses of the proceedings, among the lots in the square without regard to actual benefits; that it limits the area of assessment to the particular square without reference to benefits to adjacent squares, and without regard to the fact that actual benefits may not equal the total cost of the improvements; and, finally, that the law being general, no legislative consideration can be had in reference to the actual benefits of the area benefited in each particular proceeding taken.

It is conceded that in view of the decision of the Supreme Court in Davidson *v.* Wright, 181 U. S. 371, Congress has the right to direct that all the expenses of an improvement may be assessed upon the property benefited, and may define the territorial district considered to be benefited. We are not prepared to say that Congress, having such right, may not pass a general act for opening or widening minor streets and alleys located within a single block, and declare that the property benefited shall be held to be the property within the block, and that the cost of the improvement shall be borne by the owners of such located property. Upon such a subject we think legislative consideration can be had, and that Congress exercised it in framing and passing the act complained of. It appears to us to be quite different from the case where tracts of land are to be taken for parks or other purposes, or from the opening of streets

of considerable length, opening up a new section of a city. We must not lose sight of the fact that the Supreme Court of the United States has spoken in no uncertain tone of the powers, both of a political and municipal nature, of Congress over the District of Columbia. U. S. *v.* Lee, 106 U. S. 196. In condemning private property for public purposes hardships will often follow, be the proceedings had either under a general statute or under a special act. We may admit that special acts for the purpose specified are fairer to and better for the property owner than general acts, but to declare a genaral act unconstitutional requires something more. In our poinion, the act under which this proceeding was had is not unconstitutional.

2. This conclusion requires us to consider whether the alleged irregularities in the proceeding were such as to require a ruling that the tax complained of should be annulled. Any objection based on the ground that the Commissioners of the District failed to certify that the preservation of peace, good order, and public morals required the widening of the alley, conceding that the passageway widened was an alley and not a minor street, is of no force, provided the owners of more than one-half of the real estate in the square signed the petition upon which they acted. It appears that the District assessor certified that the persons whose signatures were appended to the petition appeared to be the owners of 121,255 square feet, which was more than the one-half of the land within the square. If the contention of the appellant that the certificate is faulty in that it states that the persons signing "appear to be the owners, etc., it would require, in order to make a certificate free from any criticism as to form, that an examination be made in all cases similar to this, as well as in this, not contemplated by the act in question or by any reasonable act. The objection is one which should be taken, if at any time, when the hearing is had before the jury. It appears that notice was given to the appellant of the time and place of the meeting, and, although the notice is objected as insufficient, we think that it was sufficient to require the presence of the appellant, if he desired to raise objections to the preliminary proceedings or to see that the damages and advantages to his property were properly passed upon. This is so at least as to technical objections, which could then have been cured. We think that the certificate of the assessor was sufficient both as to form and substance, and that the signatures to the petition were sufficient basis upon which to found his certificate. It is not to be presumed that he did not make proper examination of the official records in considering the petition, nor that he did not have sufficient proof before him that the parties signing had the legal title to the property for which they signed. While it may be that the appellant could have shown otherwise, and is injured because he did not do so at a proper time, we must consider that the tax payers of the District are entitled to have their interests guarded. While it is stated in appellant's brief that this proceeding was promptly taken, yet the record discloses nothing earlier in date than the filing of the amended petition, which was on June

3, 1904. Proceedings such as these should not only be promptly commenced but diligently prosecuted. Nevertheless, we do not question that all statutory requirements in proceedings of this nature must be observed, and that any failure to observe them can be availed of at almost any stage of the proceeding, but we have referred to what might be termed the equities and hardships of the case at bar because the appellant's argument, or brief, largely relates to them.

The objections that there is no finding by the jury of benefits, and that the assessment is in excess of the value of the lots and in excess of the benefits received, are not sufficiently shown to warrant a reversal. The jury having found the damages to the real estate to be the value of the respective parcels of land at the time of taking, proceeded, as the act required them to do, to apportion the amount of such damages as benefits to the remaining property—all this after having "entered upon said square" and after "having heard evidence introduced by the parties interested." The appellant having been served with due notice, had an opportunity to be heard on the subject of damages and benefits to his lots, and can not now be heard to insist that the taxes complained of should be annulled because the jury failed to make correct assessment and apportionment, whatever his rights may be to attack the constitutionality of the act and the preliminary steps leading up to such proceedings before the jury.

While on its face the allegations of the amended petition, especially as fortified by the brief, show a case of hardship, it is not such a one as we can recognize as vitiating the act under which the proceedings were taken or invalidating the proceeding itself.

We concluded that there was no error in the judgment of the court below, and it should be affirmed, with costs. And it is so ordered.

18 WEDNESDAY, *November 8th, A. D.* 1905.

No. 1586. October Term 1905.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE DUELL.

November 8, 1905.

19 In the Court of Appeals of the District of Columbia.

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

To the Honorable Judges of the Court of Appeals of the District of Columbia:

Comes now the above named appellant, petitioner in the court below, by his attorneys, and complains that in the record and proceedings in said cause, and also in the judgment of the Supreme Court of the District of Columbia dismissing the petition of said appellant, and in the judgment of said Court of Appeals of the District of Columbia affirming the judgment of said Supreme Court of the District of Columbia, manifest error hath happened to the great damage of said appellant.

Wherefore, said appellant, prays for the allowance of a writ of error, for the reasons specified in the assignment of errors herewith filed, and for an order fixing the amount of bond for costs in said cause, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated at Washington, D. C., November 16, 1905.

CLARENCE A. BRANDENBURG,
Appellant and Petitioner,
By BRANDENBURG & BRANDENBURG,
His Attorneys.

20 In the Court of Appeals of the District of Columbia.

No. 1586. October Term 1905.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

Assignment of Errors.

Comes now the appellant, Clarence A. Brandenburg, by his attorneys, and files the following assignment of errors upon which he will rely in the prosecution of the writ of error in the above entitled cause.

1. That the Supreme Court of the District of Columbia erred in dismissing the petition of the petitioner, appellant herein and rendering judgment against said petitioner.

2. That said court erred in finding and holding that the Act of Congress, pursuant to which the proceedings in these proceedings were had, is Constitutional and valid.

3. That said Court erred in finding and holding that the proceedings for the condemnation of the land and the assessment of benefits in these proceedings mentioned, were in accordance with law and valid.

4. That the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District of Columbia.

5. That said Court of Appeals erred in finding and holding that the Act of Congress pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment against the residue of his property was made, is Constitutional and valid.

6. That said Court of Appeals erred in finding and holding that the proceedings pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment for benefits against the residue of his land was made, were in accordance with law.

21

Wherefore, the said Clarence A. Brandenburg, appellant herein, prays that the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, may be reversed and that the proceedings for the condemnation of the land of the petitioner and for the assessment of benefits in these proceedings mentioned, may be set aside and for naught held.

BRANDENBURG & BRANDENBURG,
Attorneys for Appellant.

(Endorsed:) No. 1586. In the Court of Appeals. Oct. Term 1905. Clarence A. Brandenburg *vs.* The District of Columbia. Petition for writ of error and Assignment of Errors. Court of Appeals, District of Columbia, Filed Jan. 4, 1906. Henry W. Hodges, Clerk.

22 THURSDAY, *January 4th, A. D.* 1906.

No. 1586.

CLARENCE A. BRANDENBURG, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

On motion of Mr. E. C. Brandenburg, of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Clarence A. Brandenburg, Appellant and The District of Columbia, a manifest error hath happened, to

the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of January, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

24 (*Bond on Writ of Error.*)

Know all Men by these Presents, That I, Clarence A. Brandenburg, as principal, and Gertrude E. Brandenburg, as surety, are held and firmly bound unto The District of Columbia in the full and just sum of Three Hundred dollars to be paid to the said The District of Columbia, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of December, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Clarence A. Brandenburg and The District of Columbia a judgment was rendered against the said Clarence A. Brandenburg and the said Clarence A. Brandenburg having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The District of Columbia citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Clarence A. Brandenburg shall prosecute said writ of error to

effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CLARENCE A. BRANDENBURG. [SEAL.]
GERTRUDE E. BRANDENBURG. [SEAL.]

Sealed and delivered in the presence of—

JOS. GIEDLAETZS.
E. C. BRANDENBURG.

O. K.
E. H. T.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1586. Clarence A. Brandenburg, Appellant, *vs.* The District of Columbia. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 12, 1906. Henry W. Hodges, Clerk.

25 UNITED STATES OF AMERICA, *ss:*

To The District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Clarence A. Brandenburg is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of January, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Jan. 12, '06.

Service accepted.
F. H. STEPHENS,
Ass't Corp. Counsel.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 12, 1906. Henry W. Hodges, Clerk.

26 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbering from 1 to 25 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Clarence A. Brandenburg, Appellant, *vs.* The District of Columbia. No. 1586, January Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 15th day of January A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,067. District of Columbia Court of Appeals. Term No. 191. Clarence A. Brandenburg, plaintiff in error, *vs.* The District of Columbia. Filed January 26th, 1906. File No. 20,067.

FILE COPY.

Office Supreme Court, U. S.
FILED.
NOV 23 1906
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1906.

CLARENCE A. BRANDENBURG,
Plaintiff in Error,
v.
THE DISTRICT OF COLUMBIA.

No. 191.

Brief of Plaintiff in Error.

CLARENCE A. BRANDENBURG,
EDWIN C. BRANDENBURG,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term, 1906.

CLARENCE A. BRANDENBURG, *Plaintiff in Error*,
v.
THE DISTRICT OF COLUMBIA. } No. 191.

BRIEF OF PLAINTIFF IN ERROR.

This case comes before this court on a writ of error to the Court of Appeals of the District of Columbia. It is a proceeding begun in the Supreme Court of the District of Columbia to set aside an assessment of certain taxes, levied against lots in square 69, in the city of Washington, to cover the cost of opening a minor street through said square.

The original petition was filed in the year 1900 and the amended petition on June 3, 1904. On the filing of the petition, a writ of *certiorari* was issued, to which respondent filed a return (Record, p. 5) certifying to the court the record of the proceedings relating to said assessment.

The petition shows that the petitioner was, in 1898, and still is, the owner in fee of lots 42 and 43 in square 69, the same abutting 20.43 feet and 20 feet respectively on a public alley 30 feet in width running east and west in said square and opening upon 22d street, west, and that said lots ran back to a depth of 75 feet. Pursuant to the

provisions of an act of Congress approved July 22, 1892, authorizing the opening and extending of alleys, as amended by the act of Congress approved August 24, 1894, extending its provisions so as to authorize the opening of minor streets, the Commissioners of the District of Columbia, upon the request of the alleged owners of more than one-half of the land in said square, in February, 1898, made an application in writing to the Marshal to summon a jury to condemn the land necessary for the opening of a minor street in said square, to be known as Newport Place, by the widening of the 30-foot alley referred to, to a width of 60 feet and the extension of the same by that width through the square from 21st to 22d streets. Pursuant to such request, a jury so impanelled, and presided over by the Marshal's deputy, and not under the direction or control of any judicial tribunal, on March 17, 1898, made its award and finding whereby they undertook to condemn for the purposes of said street a part of said sublots 42 and 43 belonging to the petitioner, that is to say, 40 feet 3 inches, the width thereof, fronting upon said proposed street, by a depth of 15 feet, or one-fifth of the total area of said lots, and at the same time undertook to allow as the value of the land so taken, at the rate of 25 cents per foot, the sum of $82 for the part of sublot 42 and $75 as the value of the part of sublot 43 taken, but these amounts were never paid, but the jury sought to deduct the same from the total amount of the tax or charge apportioned against the residue of said lots, presumably as benefits. The jury, pursuant to the requirements of the law, undertook to apportion the total amount of damages awarded for land condemned, together with the costs of the proceeding against the lots in said square, and of this amount, they charged against the residue of said sublot 42, having a depth of 60 feet only, the sum of $650, less the sum of $82 allowed as the value of the part of said

lot taken, and against said sublot 43 the sum of $550, less the sum of $75 allowed as the value of the part of said lot appropriated.

The proceedings were conducted before a Marshal's jury, not subject to the control of any court, and without any rules or instructions to guide them, and the action of the jury was wholly without right of review or revision.

Pursuant to the findings of this jury, the Assessor of the District of Columbia undertook to levy against the residue of said sublots the amounts fixed by the jury as stated, which, together with the accumulation of interest at the high rate exacted by the District, remain as charges against said lots, and because of nonpayment the Collector has notified petitioner of his purpose to sell the same.

Thereafter there were levied against the lots of petitioner abutting on this alley (because it is an alley, notwithstanding its high-sounding name, but simply inhabitable under the law now when uninhabitable before), additional taxes against the property as follows: Water main tax, $50.41; sewer tax, $23.47; paving tax, $50.29; grading tax, $14.15; curb tax, $47.14.

Upon the filing of the petition, a writ of *certiorari* was granted, in response to which the record of the proceedings was returned to the court. Thereupon, the petitioner moved to quash the return (Record, p. 12) and for judgment cancelling the taxes. At the hearing before the Supreme Court of the District, upon this motion of the petitioner, the court overruled the motion, and, although no motion was made by the defendant for that purpose, dismissed the petition (Record, p. 13). From the judgment of the Supreme Court of the District overruling the motion to quash, and dismissing the petition, an appeal was prosecuted to the Court of Appeals of the District of Columbia, and that court, on the 8th day of November, 1905, affirmed the judgment of the court below.

Assignments of Error.

1. That the Supreme Court of the District of Columbia erred in dismissing the petition of the petitioner, appellant herein, and rendering judgment against said petitioner.

2. That said court erred in finding and holding that the act of Congress, pursuant to which the proceedings were had, is constitutional and valid.

3. That said court erred in finding and holding that the proceedings for the condemnation of the land and the assessment of benefits in these proceedings mentioned were in accordance with law and valid.

4. That the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District of Columbia.

5. That said Court of Appeals erred in finding and holding that the act of Congress pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment against the residue of his property was made, is constitutional and valid.

6. That said Court of Appeals erred in finding and holding that the proceedings pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment for benefits against the residue of his land was made, were in accordance with law.

BRIEF.

The petition alleges various objections to the tax under consideration which may be divided into two classes, first, those which relate to the constitutionality of the law itself, and secondly, those which relate to irregularities in the proceedings.

The act of Congress approved July 22, 1892 (27 Stat. L. 255) under which these proceedings were taken, provides as follows:

"SEC. 1. That the Commissioners of the District of Columbia be, and they are hereby, authorized to condemn, open, extend, widen or straighten alleys in the District of Columbia upon the presentation to them of the plat of the alley to be condemned, opened, widened, extended or straightened, accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, widened, extended or straightened, or when the Commissioners of the District of Columbia shall certify that the preservation of peace, good order, and public morals require that any such alley should be opened, extended, widened or straightened; or when the health officer of said District shall certify that such opening, extension, widening or straightening of an alley is necessary for the public health:

* * * * * *

"SEC. 4. That upon the filing of such plat by the surveyor in the office of the Commissioners of the District of Columbia as aforesaid, the said Commissioners shall make an application in writing to the marshal of the District of Columbia to summon and impanel a jury of twelve citizens who have no interest in the real estate mentioned in the said petition (and it is hereby made his duty to summon and impanel the same in all such cases upon application to him in writing by said Commissioners), and who, having first taken and subscribed an oath in writing to discharge the duty imposed upon them by the provisions of this act justly and impartially, shall proceed to ascertain and appraise the damages which may accrue to the real estate of any person or persons by the opening, extending, widening or straightening of such alley, which shall be the value of the land at the time of the taking, and they shall make and file a statement in writing, signed by them, of the damages so ascertained and appraised, in the office of the Commissioners of the District of Columbia, and a duplicate of said statement in the office of the recorder of deeds for the said District, and the

amount thereof shall be paid to the persons respectively entitled thereto by said District of Columbia, out of any funds available therefor; and all such alleys or extensions, widenings, or straightenings shall thereafter be kept open and free for public use.

"SEC. 5. That the said jury shall APPORTION an amount equal to the amount of said damages so ascertained and appraised as aforesaid, including six dollars for the services of said marshal and sixty dollars for the services of said jury, according as each lot or part of a lot of land in such square may be benefited by the opening, widening, extending, or straightening such alley:

"*Provided, however*, That in cases provided for in section two of this act the sums paid or agreed to be paid for the land contained in any alley or part of alley to be closed, shall first be deducted from the amount of benefits so to be assessed; and they shall make due return of such apportionment to the recorder of deeds and to the Commissioners of the District of Columbia, in which they shall designate each lot or part of a lot of land in such square so benefited, and the amount so apportioned to each, respectively; and, in case of failure to pay the amount so apportioned, it shall be the duty of the collector of taxes to levy a tax upon each said lot or part of a lot of land, in accordance with such apportionment, and to collect the same as other taxes upon real estate are collected; and said assessment shall bear interest at the rate of ten per centum per annum until paid.

"SEC. 6. That the said marshal shall give or cause to be given at least ten days' written or printed notice of the time and place of the meeting of such jurors for the purposes aforesaid to each proprietor of land in the square designated as the location of such alley."

The foregoing act was amended by the act of August 24, 1894 (28 Stat. L. 501) so as to authorize the opening of minor streets.

The Act of Congress is Unconstitutional.

The petition alleges that the act of Congress, under which the proceedings for the opening of Newport Place were had, is unconstitutional because it provides for the taking of private property for public use without just compensation and without due process of law, in that it provides for the apportionment of the total amount of the damages awarded for the land condemned, with the expenses of the proceedings added, among the lots in the square without regard to actual benefits; secondly, because the law limits the area of assessment to such particular square without reference to benefits to adjacent squares, and without regard to the fact that the actual benefits may not equal the total cost of the improvements; and lastly, because the act arbitrarily requires the assessment of such total costs to the particular square, *without a legislative determination of the actual benefits or the area benefited, such determination being impossible because said law is general in nature and was passed without a legislative consideration of the particular improvement long before the particular improvement was contemplated.*

In view of the decision of the Supreme Court in Wight, *v.* Davidson 181 U. S. 371, it is not questioned that Congress may direct the whole or part of the expense of a public improvement to be assessed upon the owners of land benefited thereby, and that the lands to be assessed may be either determined by Congress itself, by defining a territorial district, or by other designation, or it may be left by Congress to the determination of Commissioners, and may be made to consist of such lands, and such only, as the Commissioners decide to be benefited; and the rule of apportionment of the tax also rests within the discretion of Congress.

Wight *v.* Davidson, *supra*, and Bauman *v.* Ross, 167

U. S. 548, make it clear that there are but two ways of determining what lands shall be assessed for the cost of a public improvement; first, by Congress itself in the act authorizing the proceeding, which is considered to be a "legislative determination"; or, secondly, by a commission or other tribunal, "and be made to consist of such lands and such only, as the commissioners shall decide to be benefited." Bauman *v.* Ross, *supra.*

The act of Congress under which this proceeding was had provides "that the jury *shall apportion* an amount *equal to the amount of said damages* so ascertained and appraised as aforesaid (including expenses) according as each lot or part of lot of land in such square may be benefited."

That is to say, this act fixes the taxing area as the particular square in which the minor street is to be opened. This was fixed by Congress itself. It was not left to the jury. The only thing left to the jury was the apportionment—the act says "shall apportion"—of "an amount equal to the amount of said damages, that is to say, the total amount of damages, with expenses added. The assessment *area* was not left to the jury and "made to consist of such lands and such only, as the commissioners (jury) shall decide to be benefited," as held in Bauman *v.* Ross.

The area benefited, not having been left to the determination of the jury, it must have been and was in fact, in this case, fixed by Congress itself. The Supreme Court in Paulsen *v.* Portland, 149 U. S. 30, said that the legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district.

That is to say, Congress may itself, legislatively, determine the assessment area. And it is on the theory that

Congress itself legislatively determined the assessment areas that the various laws for the extension of streets in the District of Columbia, have been upheld; that is, the laws by which Congress fixed the assessment area and required the assessment of the whole or part of the cost of opening streets against the lands abutting upon the streets opened.

Neither element, absolutely necessary to the validity of such a law, was present in this case. The determination of the area benefited was not left to the jury; and Congress itself did not legally, because it could not, legislatively determine the area benefited by the opening of Newport Place.

When Congress directed the opening of S street, for instance, in the city of Washington, considered in Wight *v.* Davidson, and required the assessment of the cost against the abutting property, it had before it the particular situation, it knew, or is legally presumed to have known, what the expense of opening the street would be and whether the abutting property would be benefited in the amount equal to the cost of opening the street; and as said in Paulsen *v.* Portland, Congress is "supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the (assessment) district."

In this case there was no such legislative consideration *because there legally could not be.* It was an impossibility. The act authorizing the opening of streets, under which the Commissioners undertook to open Newport Place, was not a law dealing with that particular situation. It was a general law. It was passed years before there was any thought of opening this particular street. The particular Congress passing the law had long since passed out of existence. The situation in the District had changed. Congress did not know and could not have known that

six or more years thereafter an application would be made to open this particular street. It could not therefore have legislatively determined what property would be benefited, or that such property would be benefited to an amount equal to the total amount of damages awarded plus expenses. In this case the legislature is not "supposed to have made proper inquiry" because it could not and did not.

This law arbitrarily, without any legislative consideration of the particular improvement, fixes the minimum amount below which the assessment can not fall, and peremptorily directs that it be levied against all the property in this particular square, and wholly withdrew the question of benefits from the jury and left to it merely the question of apportionment. It is therefore in violation of the Constitution, because it required the jury to assess the costs of the improvement against petitioner's lots and the other lots in the square, without regard to the actual benefits, without permitting the jury to determine what property was benefited, and without a legislative determination of such benefits.

To illustrate the operation of this general law to situations not considered by Congress when it arbitrarily fixed the assessment area, we call attention to the fact that Twenty-second street, is but little improved but it so happened that on Twenty-second street, just in the line of the proposed street, there was a large three-story brick dwelling. Its removal was a positive detriment. Now, the benefit, if any, to the owners of the property in the square was not increased by the fact that the damages included a large sum paid for this house removed, and yet the assessment was increased to that very extent. The benefit to the square would have been just as much, waiving the fact that the removal of the house was a detriment, if there had been no house in the line of the proposed street.

How can it be reasonably said that the benefit was increased therefore by the value of the house removed? It is positively absurd. This law may be tested by considering what may be done under it by assuming a case in which the value of the property or building in the line of the proposed improvement is much greater than the house in the line of Newport Place. Assume that the majority of the owners in the square in which the Washington Loan & Trust Co. has its building should petition to the Commissioners to open a minor street in that square so as to pass through the place where that building stands. If there is any possible benefit to the remaining lots in the square, would it be greater because a very valuable building had to be removed? And would the benefits be increased by an amount equal to the value of the building removed? Yet, under this law, the total amount, including the value of the building, would have to be assessed against the remaining lots in the square. Is a law that permits or requires such a thing valid? We submit not.

The remarkable thing about the law is, that the provision under which this street was opened and under which an alley through the square referred to could be opened, that it does not depend upon the question of public necessity. The act authorizes the Commissioners to condemn the land necessary for an alley or minor street whenever the owners of more than one-half of the land in the square petition for it. It says the Commissioners "are authorized" to do so. In an act of Congress such words may well be taken to be mandatory and not discretionary. When such a petition is filed, the Commissioners are not required to find that the public needs require the street or alley to be opened. The only thing for determination is whether a sufficient number of people ask it. Such a law is obnoxious to one's sense of justice.

There is of course no parallel between this case and the case of a street improvement such as laying of sidewalk, curbing and the like, where the amount involved is small, per lot, the cost of the work is *well known and uniform* and the excess, if any above the cost, is used for the maintenance of a system of street improvements, as held in Parsons *v.* District of Columbia, which the minority of the court considered as the limit, and permitted to pass, as stated in the opinion in French *v.* Barber Asphalt Paving Co., because the court found that the cost of laying the improvement was not substantially in excess of the cost thereof.

Manifestly, a legislature can not be permitted to arbitrarily prescribe a fixed rule, where the improvement is of such character that its nature and cost would necessarily be different in different sections of a city, such as the opening of minor streets, the amount of cost depending upon the particular location of the minor street and the particular square and buildings to be destroyed and paid for in the course of opening the street. In one square there may be no buildings to be removed while in another, property valued at millions of dollars may have to be destroyed. Certainly Congress can not be permitted to arbitrarily prescribe a fixed rule and refuse either to determine itself in a particular case, the question of the extent of private benefits, or refuse to permit any other tribunal to do so. To say, by a wholesale or omnibus law, that in all cases arising, the entire cost of opening a minor street, no matter what that cost may be, and even though it is impossible to surmise or know in advance anything about the extent of such cost, or the particular circumstances or the particular case, shall be borne by those who happen to own property in the vicinity, clearly is not the law.

Norwood *v.* Baker, 172 U. S. 269, would seem to con-

trol this case, though this case is stronger, if anything, because here the act not only imposes the whole cost plus expenses as taxes against the property in a single square, but there was no legislative determination, as in the Norwood case, of the area benefited. In that case this court, in condemning the ordinance then before it, said:

> "The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost." (P. 290.)

In this case the whole cost of the improvement must be assessed. In the street extension cases, the proceedings are conducted under direction of the court, under its instructions and subject to its review. Here it was conducted before a Marshal's jury, presided over by his deputy, without instructions, and without regard to legal rules pertaining to evidence, and without right of review or revision.

We therefore respectfully contend that this alley and minor street law is unconstitional. It arbitrarily fixed the assessment area without a legislative determination of the area benefited, such a determination being an impossibility, and required the jury to apportion the total costs, plus expenses against the property in a single square.

No Right to Open the Street.

Assuming the validity of the law, the assessment should be quashed because the proceedings for the opening of Newport Place were not in accordance with law.

As heretofore referred to, there was no finding by the Commissioners that public interests required the opening of Newport Place, nor any finding by the health officer, in the terms of the act, that the public health required it. The proceedings were taken under the first clause of the

first paragraph of the act which directed the Commissioners to proceed upon petition of "the owners of more than one-half of the real estate in the square."

We submit that it is absolutely essential, as a basis for the validity of these proceedings, that it should appear that when the Commissioners ordered the Marshal to proceed, the owners of more than one-half of the real estate in the square requested it, and we deny that this was furnished or that the record shows it to have been done.

The returns found in the record show what persons signed the petition and also purport to show for what property. Among others it was signed by Evelyn B. Jones, as executrix of Mary E. Jones, deceased; Gertrude B. Moss by G. W. Moss, attorney; John M. Johnson, trustee; William L. Bramhall, trustee, and Richard L. Britton, trustee. If the property for which these persons signed were deducted, it would leave less than one-half of the property in the square owned by the remaining persons who requested the opening of the street. The authority of the persons named to sign is expressly denied in the petition and this denial is not met either in the answer or by the record returned.

It will be observed that the petition bears date on December 23, 1897. The Commissioners acted upon the certificate of the Assessor, found in the return, "that the records of the Assessor's office of the District of Columbia, show that on *December 23, 1897*, square 69 * * * contains 181,047 square feet of land and that on the *above date* the persons whose signatures are appended to the petition asking for the condemnation of land necessary to widen and extend alley in said square to a width of sixty feet, * * * *appear* to be the owners of 121,255 square feet of land in said square."

It will be noted that he certifies merely that according

to the records in the office of the Assessor, the persons who signed appear to be the owners. Is that evidence of ownership? The act requires that the petitioners *must* be the *owners*. Would an infant buy title on the basis of the accuracy of the records in the Assessor's office? The law does not require that his records shall be evidence of ownership. He does not even certify his belief in the accuracy of his records. He does not certify that the persons signing are in fact the owners. He could not. He merely certifies that according to his records, they "appear" to be the owners. At that time his records were made up, according to our recollection, biennially and were not kept up to date. The proceedings in this case however, were not ordered till *February 1, 1898*. It is clear the law contemplated that the persons petitioning should be the owners at the date the proceedings were ordered. This was not done. There is no sufficient evidence that they were in fact owners on December 23, and there certainly is no presumption that they were in fact the owners on February 1st of the succeeding year. There is no presumption of law that an executor has authority to deal with the real estate. An executor is not and can not be the owner of real estate, and yet executors signed. The law requires that "owners" shall request it. There is no presumption that George W. Moss, as "attorney" had any authority to sign on behalf of his wife, and there is nothing to indicate that the several persons who sign as "trustees" had any warrant in the premises.

It is a fact that there is no finding by the Commissioners themselves that the signers were the owners of more than one-half the property. It does not appear that they approved the report of the Assessor. We have, therefore, a case in which certain persons, to promote private ends, without any finding that the public interests required it, setting in motion the powerful machinery of

the government to condemn land of other citizens against their protest and without their consent. One rule of construction may well apply where such proceedings are inaugurated pursuant to a finding that the public interests required it, as suggested by the very act itself, but a different rule should apply where the proceeding is had at the request of private individuals to promote private ends, even though the land acquired thereby became public property. The right to take is restricted to a taking for public use. The use happens to be public here, but it was done to promote private ends. The power to take the land of a citizen against his consent is an obnoxious one and its exercise has always been carefully scrutinized by the courts. Is it possible that it was within the contemplation of the framers of the Constitution that this power should be exercised at the request of private individuals to promote private ends, even though the property acquired thereby became public property?

Cooley on Taxation [last edition], 3d edition, Vol. 2, page 1244, says:

> "Legislative action, if properly taken, is conclusive of the propriety of the proposed improvement, and of the benefits that will result, *if it covers that subject*, but it will not conclude as to the preliminary conditions to any action at all; such, for example, as that there shall be in fact such a street as they undertake to provide for the improvement of, or that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion of the parties concerned. This last provision *is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage in the proceedings.* And any decision or certificate of the proper authorities, that the requisite application or consent had been made, *would not be conclusive, but might be disproved.*"

And in the note the author says (p. 1247):

> " Property owners whose property will be charged by the establishment of a paving district are entitled to insist that the several petitioners sign in such a way as to be fully and legally bound, and *no signatures which do not so bind the owners of the property purporting to be affected thereby may be counted in passing upon the validity of such a petition.*"

The same note states, and gives authorities in support thereof, that neither executors, administrators nor agents are owners entitled to validly sign such a petition.

The same rule obviously applies to persons signing as trustees, where there is nothing to indicate authority to sign, particularly where such authority is denied. If those signing as trustees are excluded, much less than one-half of the property was signed for in this case. A distinction will be noted in the signing by Messrs. Norment and Edwards, as trustees, who recognizing that mere trustees possess no such authorities, add to their signatures a statement that they are trustees with power of sale.

The fact that certain of the signers of the petition were trustees, indicates of course that they were not absolute owners—owners, in other words, which are the persons the law requires should sign. It also indicates that they have been entrusted with certain powers concerning the property. The fact that they are mere trustees negatives the idea of ownership with authority to do anything that prejudices the trust estate. It does not anywhere appear that they had any authority whatever in the premises. It was necessary that such authority should appear.

A naked or dry trustee certainly has no such authority.

Hill on Trustees, 461, 569.

In Mayor etc. *v.* Boyd, 64 Md. 10, the court calls attention to the fact that such assessment as made in that case

is not a mere personal charge against the owners, but a lien upon the whole property and the entire interest of life tenant and remainderman may be sold for its non-payment. Such being the case, it is apparent that a person signing as trustee must be such trustee of the entire estate, life estate, and free, with authority in the premises broad enough to authorize him to request proceedings that will result in a charge against the trust estate. There is nothing to show the existence of any such authority in this case. In the Maryland case mentioned, the court referred to the Act of Maryland, 1874, ch. 218, which expressly provides that tenants for ninety-nine years, with the executors and administrators of such tenants, or the guardian of an infant or a mortgagee in possession, should be taken as owner within the meaning of the law authorizing owners to petition for an improvement; but held that a life tenant had no such authority. Moreover, it excluded from consideration, a signature of one "Richard Cromwell, as trustee," the effect of which was to defeat the assessment. There is no statute, however, in the District, authorizing mere life tenants, executors, or attorneys to sign.

As also sustaining the proposition that the finding of the Commissioners that the requisite number of persons had signed, may be questioned, see—

Ziegler *v.* Hopkins, 117 U. S. 683.
Ogden City *v.* Armstrong, 168 U. S. 235, 236.
Mulligan *v.* Smith, 59 Cal. 225–229–239.

We submit, therefore, that the very basis of this entire proceeding is not in accord with the requirements of the law and that the assessment complained of should be quashed.

No Sufficient Notice.

Since Davidson *v.* New Orleans, 96 U. S. 97, and the many other cases to the same effect by this court, it

is undoubtedly the law that notice is essential to the validity of a special improvement tax.

In Allman *v.* D. C., 3 App. D. C. 20, the Court of Appeals said:

> "Seasonable notice at some serviceable stage of the proceeding is absolutely necessary to the validity of an assessment."

To the same effect is Davidson *v.* Wight, 16 App. D. C. 371.

It is obvious that the notice must indicate what is intended to be done pursuant to it. The law in this case directs that the "Marshal shall give or cause to be given at least ten days' notice written or printed of the time and place of the meeting of such jurors, for the purposes aforesaid." The purposes "aforesaid" were the assessment of damages *and* the assessment of benefits, or rather, in the words of the act, the apportionment of the damages. By reference to the return in this case it will be seen that the notice provides that there had been summoned "a jury of 12 disinterested citizens to ascertain the damages which may accrue to any individual or individuals by the opening of Newport Place as above stated in accordance with the plans and petition therein enclosed, you are hereby notified that the said jury so directed to be summoned as aforesaid, will meet to assess the said *damages* as aforesaid at the southwest corner of 21st and O streets." This is merely a notice of purpose to assess damages, and contains no reference whatever of a purpose to apportion the damages as benefits. Certainly a citizen is not expected to attend a street corner meeting pursuant to such a notice for the purpose of ascertaining what assessment may be made against his property, in the absence of notice of such purpose. We therefore insist that the notice in this case was insufficient and the proceedings thereunder, so far as they relate to the assessment of benefits, invalid.

There is no Finding of Benefits.

Giving the most liberal possible construction to the law and the acts thereunder, it is certainly true that, to sustain an assessment on the theory of benefits, there must be an actual finding by the jury that the property assessed is in fact benefited to the extent of the assessment. Looking to the return of the jury we find they say: "We ascertain, appraise and value the damage which may accrue to the real estate of any person or persons by the opening of said minor street and the closing of said alleys, said several amounts of damages being the value of the respective parcels of land at the time of taking, viz:" Now, that is a finding of damages in regular form. But they made no finding as to benefits. They merely return that they "hereby *apportion* the amount of said damages." * * (Rec., p. 10). Not a single word more; and not a suggestion, in fact, not a single word about *benefits*. They do not find and return that the several parcels of property therein mentioned are in fact benefited as therein stated. They merely add a list showing the *apportionment* of the damages. The fact is they did not make a finding of benefits and would not. We therefore contend that the proceedings are incurably defective in that there is no actual finding of benefits.

Assessment is in Excess of the Value of the Lots and in Excess of Benefits Received.

The word "confiscation" is frequently used in proceedings of this character without expectation that the word will receive its true and full signification. In this case, we characterize the assessment against this property as confiscation in its true sense. As we understand the law confiscation of private property by public authority is forbidden by the Constitution. If that be so, then the

confiscation of the petitioner's property by means of the extraordinary assessment levied against it, is in violation of the Constitution.

In Norwood *v.* Baker, *supra*, the Supreme Court, in discussing the case of Parsons *v.* District of Columbia, said :

> "If the cost of laying the water main in question in that case had exceeded the value of the property specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented."

In numerous other cases it has held that any assessment for alleged benefits in substantial excess of the benefits received, is, to the extent of such excess, invalid, and if assessed under a rule or system without regard to actual benefits, the whole tax is invalid.

In this case the assessment for alleged benefits was twice the amount per foot, of the value of the land and twice the value of the entire land assessed. The jury finds the value of the land taken, which was part of the lots taken, the frontage in fact, to be worth 25 cents per foot, and allowed for the portion taken at that rate. The lots remaining were 40 feet front by a depth of 60 feet, and contained 2,400 square feet of ground. The value, on the basis of the finding of the jury itself, was $600. The tax against the property was $1,200, or exactly twice the value of the land. The assessment per foot as made by the jury was 50 cents, or twice the amount allowed as the value per foot for the property taken. Is that reasonable or can it possibly be valid? As said by the Supreme Court, if the assessment exceeds the value of the land assessed, a different question arises, which means, if it means anything, that such an assessment is invalid.

But the petition goes farther, and in good faith expressly

avers, and it is not denied, that with the alleged improvements added, that is to say, after the opening of the street, the lots plus the alleged benefits from the opening of the street with local improvements are worth less than the amount assessed as a tax against the property.

And as bearing upon the matter of confiscation, we call attention to the fact that there was an outstanding deed of trust upon this property, between which and the land has been interposed about $1,500 in special assessments, which utterly destroys the security of the note, and leaves petitioner liable for the amount of the note. We characterize the proceeding as confiscation and submit it is invalid.

We believe Newport Place is the only street opened under this obnoxious act. On December 14, 1903, recognizing the obvious injustice of this law, the Commissioners recommended to Congress its amendment—virtually its repeal—and wrote a letter in support thereof, found in Senate Report No. 4,589, 58th Congress, 3d Session, in which they say:

> "Under existing law alleys and minor streets are opened by a proceeding conducted out of court by a marshal's jury of twelve. The proceeding, consequently, is not a matter of record, is not subject to judicial supervision, and is extremely and unnecessarily expensive. The proposed bill puts this matter in line with all other condemnations of land for public uses in the District of Columbia. * * * Under existing law the entire cost, damages, and expenses of the condemnation for an alley or a minor street must be assessed exclusively upon the land in that particular square, the *function of the jury simply being to apportion that amount within that area. This is wrong in principle and results in great injustice in practice.*
>
> "If an alley or a minor street is to be opened and

> property adjacent to the square through which the alley or minor street is to pass is benefited, as in a great majority of cases it is, such property should bear the burden to the extent that it may be benefited. This just principle was carried into the street extension acts of 1900, and is embodied in this bill."

In other words, recognizing the rank injustice of proceedings under the law now assailed, the authorities of the District, who are now resisting this proceeding, themselves applied to Congress to change the law because, as they say, "it is wrong in principle" and "results in great injustice in practice." The great injustice in practice to which reference is made is the unjust assessments in square 69 resulting from the opening of Newport Place.

Congress at the last session has adopted the views of the Commissioners and passed a bill relieving the present law from all the objections now made, by providing for notice, for hearing under direction of a court, for right of review, for assessment according to benefit, and extending the area of assessment to include all property actually benefited.

Justice seems to require that this particular tax should be annulled and we trust it will be done.

Respectfully submitted,

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1906.

CLARENCE A BRANDENBURG, *Plaintiff in Error*,
v.
DISTRICT OF COLUMBIA.
No. 191.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The whole contention of the defendant in error in support of the constitutionality of the Act of Congress here in question is, it is respectfully submitted, based upon a series of fallacies.

In the first place, the exclusive jurisdiction of Congress over the District of Columbia is not, as the defendant in error would have it appear, exclusive of the prohibitions of the Constitution of the United States. National Bank *v.* County of Yankton, 101 U. S. 133, United States *v.* Lee, 106 U. S. 196, Wong Wing *v.* United States, 163 U. S. 238, Downes *v.* Bidwell, 182 U. S. at pp. 258 and 261. The word "exclusive" simply means, *exclusive of the States.*

In the second place, while the question of whether there shall be a special assessment upon property specially and peculiarly benefited by a public improvement to the extent of the special benefits, or whether the whole cost of the improvement shall be raised by a general tax, is a *question of legislative expediency, purely and simply*, and may be determined and declared by a general law applicable to all cases which may arise. The question in the cases as they arise, as to whether property is specially and peculiarly benefited by an improvement,

the extent of the benefit, and accordingly the amount of the special assessment, is not a question of legislative expediency to be determined according to either the wish or the caprice of the legislature, but it is a *question of fact, purely and simply,* and, being a question of fact, the determination of it, of course, depends upon the facts surrounding the improvement. Spencer *v.* Merchant, 125 U. S. 353 (quoted with approval in French *v.* Paving Co., 181 U. S. 338), in which this Court said:

> "The Question of Special Benefit, and the Property to Which it Extends is of Necessity a Question of Fact."

Accordingly, in order to justify the enactment of a law by a legislature providing that a certain area or district shall bear a special assessment representing the cost of a public improvement, made for the public interest, and *not for the purpose simply of such area or district,* or made partly for the public interest and partly for the interest of such area or district, the legislature must first give an honest consideration to the facts—the fact of the amount of the cost of the improvement, the fact of the amount of the special benefits, and the fact of whether the amount of the former fairly represents the amount of the latter; and questions of fact which necessarily differ in substantial respects in the different cases arising obviously can not be determined in a general or omnibus fashion in advance.

In the third place, none of the cases relied upon by the defendant in error can fairly be said to be in contravention with the proposition urged by us.

In Walston *v.* Nevin, 128 U. S. 578, and Shoemaker *v.* United States, 147 U. S. 282, the Acts in question expressly directed the tribunal to make necessary corrections to keep the assessment within the limits of the actual benefits.

"Unjust, unequal, or arbitrary burdens are not authorized to be imposed by the terms of the Act, and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the courts, which are specifically authorized to 'make all corrections, rules and orders to do justice to all parties concerned.'" Walston *v.* Nevin, *supra*, p. 581.

"* * * it was provided that if the commission should find that the benefits were not equal to the cost and expenses of the land obtained for the park, they should assess each tract specially benefited to the extent of the benefit thereto." Shoemaker *v.* United States, *supra*, at p. 286.

In Mattingly *v.* District of Columbia, 97 U. S. 687, Mobile County *v.* Kimball, 102 U. S. 691, Louisiana *v.* Pillsbury, 105 U. S. 278, Spencer *v.* Merchant, 125 U. S. 357, and Wight *v.* Davidson, 181 U. S. 371, the legislatures passed upon individual cases of improvements, and since the facts were readily known and ascertainable, it was held simply that it should be presumed, nothing appearing to the contrary, that the assessment was made with regard to the facts.

In Bauman *v.* Ross, 167 U. S. 550, and Parsons *v.* District of Columbia, 170 U. S. 51, the whole situation passed upon in respect of the improvements provided for, was substantially known and uniform.

In the Irrigation and Reclamation Cases, Davidson *v.* New Orleans, 96 U. S. 97, Hagar *v.* Reclamation District No. 108, 111 U. S. 701, and Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, the assessment area was determined by a tribunal after hearing all parties, and the assessment itself was effectual and enforceable only in a court of justice, where the parties were entitled to notice and allowed to contest the validity and the amount of the assessment. Moreover, it is to be observed, that in those cases this Court doubted whether the particular

legislation being passed upon would be valid, if it had been Federal, instead of State, legislation.

> "If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Fifth Amendment, with the one we are construing was left out and this was taken." Davidson *v.* New Orleans, *supra*, p. 105.

> "The Fifth Amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal Government as has many times been decided. * * * In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property without due process of law." Fallbrook, etc. *v.* Bradley, *supra*, p. 158.

In view of the fact, however, that the process of law complained of in those cases was the settled process of law in the State at the time of the adoption of the Fourteenth Amendment, it was held that the general term "due process of law" in that Amendment should not be construed as prohibitory of it, the holding being in line with the settled determination by this Court in Minor *v.* Happersett, 21 Wall. 171, Bowman *v.* Lewis, 101 U. S. 22, 31, and Hurtado *v.* California, 110 U. S. 535.

In French *v.* Paving Co., 181 U. S. 324, the process of law complained of was also the settled process of law in the State at the time of the adoption of the Fourteenth Amendment, and, moreover, the situation in regard to which the assessment was made was one which was substantially well known and possessed the characteristic of substantial uniformity also.

In the fourth place, we submit that the decision of this Court in Norwood *v.* Baker, 172 U. S. 269, is con-

trolling in the case at bar. In that case the Court was not hampered because of any settled due process of law in the State at the time of the adoption of the Fourteenth Amendment, the due process of law in that State at the time of the adoption of the Amendment including an express provision that private property should not be taken for public use without compensation and that special assessments should not exceed special benefits. This Court, therefore, held that notwithstanding provision was made for giving some kind of a hearing to the parties before a court of justice before the assessment could be effectual, and notwithstanding the plaintiff had a hearing, and notwithstanding the ordinance providing for the special assessment related to a particular improvement, it appeared very clear that no consideration had been given to the determination of the *fact* of the amount of the special benefits, if any, and that the assessment was, therefore, void.

In the case at bar, this Court is, it is submitted, without difficulty as to the character of process of law required, because the Fifth Amendment has been in force as a restraint upon the Federal power from the beginning, and it has been utterly impossible for any acts repugnant to that Amendment to become the law of the land so as to render them due process of law (Marbury *v.* Madison, 1 Cranch, 176), and, moreover, the Fifth Amendment contains an express provision limiting the due process of law to such as shall not take private property for public use without just compensation. Furthermore, in the case at bar no hearing was provided for in a court of justice as a prerequisite to the assessment becoming effectual, and, therefore, none was or could be had. Then again, in the case at bar the law did not relate to a particular improvement, and, furthermore, questions of fact can not be determined in a general omnibus fashion by a general rule without considering

them. So far as the contention of the defendant in error that a hearing was provided for by the law before a jury is concerned, it is believed to be sufficient to quote from the opinion of this Court in C. B. & Q. R. R. Co. *v.* Chicago, 166 U. S. 226, as follows:

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, can not convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." (pp. 236–237.)

In the case at bar the sole province and power of the jury was to assess the damages and *apportion* the same with costs to the remaining property in the particular square in which the street was opened, with no rights of review of any kind before any judicial tribunal. In this respect the case at bar is more irregular than even Norwood *v.* Baker, *supra*, in which one of the main grounds of dissent, as stated by Mr. Justice Brewer, was that "the cost of this improvement was settled in judicial proceedings."

In conclusion, attention is called to the fact that the quotation from the case of United States *v.* Lee, set out in the closing portion of the brief of the defendant in error is unintentionally incomplete but is at the same time misleading. By reading the full paragraph (p. 217) from which the excerpt is taken a conclusion is reached foreign to the idea sought to be conveyed by the quotation.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1906

No. 191

CLARENCE A. BRANDENBURG, PLAINTIFF-IN-ERROR,

vs.

DISTRICT OF COLUMBIA

BRIEF FOR THE DEFENDANT

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Supreme Court of the United States

OCTOBER TERM, 1906.

No. 191.

CLARENCE A. BRANDENBURG, PLAINTIFF-IN-ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR THE DEEENDANT

STATEMENT OF THE CASE.

This case is the first of two cases, in point of time, brought to set aside certain assessments made on lots 42 and 43, square 69, for the opening of a minor street, known as "Newport Place" in said square.

The petition alleges that the Commissioners, acting under the authority of the act of July 22, 1892, and the amendment thereto of August 24, 1894, opened a minor street in said square, and assessed benefits against the said lots, of which the appellant is the owner, exceeding the damages occasioned by the taking of the land condemned.

The act of July 22, 1892, is as follows:

"*Be it enacted, etc.* That the Commissioners of the District of Columbia be, and they are hereby, authorized to condemn, open, extend, widen, or straighten alleys in the District of Columbia upon the presentation to them of the plat of the alley to be condemned, opened, widened, extended, or straightened, accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, widened, extended, or straightened, or when the Commissioners of the District of Columbia shall certify that the preservation of peace, good order, and public morals require any such alley shall be opened, extended, widened or straightened, or when the Health Officer of said District shall certify that such opening, extension, widening, or straightening of an alley is necessary for the public health; provided, that in the opening, extension, widening or straightening of an alley, the fee of which is in the United States which may thereby become useless or unnecessary; and it shall also, in like manner, be lawful to close any other alleys or parts of alleys the title thereto to revert to the person or persons who dedicated the same for alley purposes or their assigns.

Sec. 2. That it shall be the duty of the surveyor of said District, as soon as may be thereafter, to distinctly mark off such alley in the manner in which it may be designated in the petition therefor and make out triplicate plats of such alley showing its courses and boundaries and the quantity in square feet which may be taken from the lots or parts of lots in the square by the opening, extending, widening, or straightening thereof, and showing also the alley or part of alley to be closed, if any, and the lots or parts of lots to which the land contained in such closed alley is to be annexed; one of which plats shall be deposited with the recorder of deeds of said District to be filed among the records of his office, another to be kept in the office of the surveyor of said District, and one filed in the office of the Commissioners of the District of Columbia.

Sec. 3. That in the opening, extension, widening, or straightening of an alley as herein provided for, it shall be lawful for the Commissioners of the District of Columbia to close any alley or part of an alley thereby rendered useless or unnecessary, the fee to which is in the United States, by entering into an agreement with the owners of the lots or parts of lots contiguous thereto for the purchase by them of the land contained in said alley sought to be closed, at a price to be agreed upon by the said Commissioners and the said owners, which price shall not be less per square foot than the assessed value per square foot of the contiguous lots; said agreements to be recorded in duplicate, one of which shall be filed in the office of the recorder of deeds and the other in the office of the Commissioners of the District of Columbia, and the sums so agreed to be paid shall be assessed severally against the lots or parts of lots to which the land so purchased shall be annexed, such assessments to bear interest at the rate of ten per centum per annum until paid, and shall be collected as other taxes are collected: Provided, however, That the Commissioners of the District of Columbia may, in their discretion, sell and convey the land contained in the alley to be closed for cash to any person or persons. That the Commissioners of the District of Columbia may, in the opening, extension, widening, or straightening of an alley, close an alley, or part of an alley, the fee to which is not in the United States, provided the owners of all the lots or parts of lots abutting thereon and the party or parties holding the fee title to the land contained in the alley to be closed shall first sign and file a petition therefor, in duplicate, together with a plat thereof, in duplicate, as provided by the first section of this act, one copy of which shall be filed with the recorder of deeds and the other in the office of the Commissioners of the District of Columbia.

Sec. 4. That upon the filing of such plat by the surveyor in the office of the Commissioners of the District of Columbia as aforesaid, the said Commissioners shall make an application in writing to the marshal of the District of Columbia

to summon and empanel a jury of twelve citizens who have no interest in the real estate mentioned in the said petition (and it is hereby made his duty to summon and empanel the same in all such cases upon application to him in writing by said Commissioners), and who, having first taken and subscribed an oath in writing to discharge the duty imposed upon them by the provisions of this act justly and impartially, shall proceed to ascertain and appraise the damages which may accrue to the real estate of any person or persons by the opening, extending, widening, or straightening of such alley, which shall be the value of the land at the time of the taking, and they shall make and file a statement in writing, signed by them, of the damages so ascertained and appraised, in the office of the Commissioners of the District of Columbia, and duplicate of said statement in the office of the recorder of deeds for the said District, and the amount thereof shall be paid to the persons respectively entitled thereto by said District of Columbia, out of any funds available therefor; and all such alleys or extensions, widenings, or straightenings shall hereafter be kept open and free for public use.

Sec. 5. That the said jury shall apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid, including six dollars for the service of said marshal and sixty dollars for the services of said jury, according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending, or straightening such alley: Provided, however, That in cases provided for in section 2 of this act the sums paid or agreed to be paid for the land contained in an alley or part of alley to be closed, shall first be deducted from the amount of benefits so to be assessed; and they shall make due return of such apportionment to the recorder of deeds and to the Commissioners of the District of Columbia, in which they shall designate each lot or part of lot of land in such square so benefited, and the amount so apportioned to each, respectively; and, in case of failure to pay the amount so apportioned, it shall be the duty of the collector of taxes

to levy a tax upon each lot or part of lot of land, in accordance with such apportionment, and to collect the same as other taxes upon real estate are collected; and said assessment shall bear interest at the rate of ten per centum per annum until paid.

Sec. 6. That the said marshal shall give or cause to be given at least ten days written or printed notice of the time and place of the meeting of such jurrors for the purposes aforesaid to each proprietor of land in the square designated as the location of such alley. If the proprietor be a resident of the District of Columbia the notice shall be served by delivering a copy thereof to him or her personally, or leaving it at the usual residence with some person over ten years of age. If the proprietor be a nonresident the notice shall be served by delivering a copy thereof to his or their tenant or agent, or depositing it in the post-office at Washington City, enclosed in a post-paid envelope, which shall be addressed to the proprietor at his or her post-office address. If the proprietor or proprietors be under twenty-one years of age the notice shall be served as hereinbefore provided upon the guardian or parent of such minor or minors. A return of such service and the manner thereof shall be made by the marshal to the Commissioners of the District of Columbia, and shall be filed among the records of said District.

Sec. 7. That all alleys opened or extended in the city of Washington since June thirtieth, eighteen hundred and seventy-one, under an ordinance of the late corporation of Washington, approved November fourth, eighteen hundred and fourty-two, are hereby made valid: Provided, That nothing in this act shall affect the rights of parties to suits now pending in such cases.

Sec. 8. That all alleys or parts of alleys hereinbefore closed by subdivision, with the approval of the Commissioners, shall remain unaffected by this bill.

Sec. 9. If any moneys from the sale of land in which the United States is interested shall remain after carrying out the provisions of the preceding sections of this act,

such moneys shall be paid into the Treasury of the United States, by the Commissioners of the District of Columbia.

Sec. 10. That all acts and parts of acts inconsistent with the provisions hereof are hereby repealed."

(27 Stat. 255.) Approved July 22, 1892.

The amendatory act of August 24, 1894, reads as follows (28 Stat. 501):

Be it enacted, &c. "That the act of Congress approved July twenty-second, eighteen hundred and ninety-two, entitled 'An Act to provide for the opening of alleys in the District of Columbia,' be and the same is hereby, amended so as to authorize the Commissioners of the District of Columbia, under the terms and conditions of said act in regard to the opening, extending, widening or straightening of alleys, to open minor, streets in said District of a width not less than forty feet, nor more than sixty feet, to run through a square from one street to another, whenever in the judgment of said Commissioners the public interests require it.

Sec. 2. That the words, "one copy of which (plat) shall be filed with the recorder of deeds and the other in the office of the Commissioners of the District of Columbia," in section three of said act be, and the same is hereby amended to as to read "one copy of said plat shall be filed and recorded in the office of the surveyor of the District of Columbia, one in the office of the recorder of deeds of the District of Columbia, and one in the office of the Commissioners of said District."

Sec. 3. That the words "six dollars for the services of said marshal," in section five of said act be, and the same are hereby, amended so as to read, "five dollars per diem for the service of the said marshal when actually employed."

It will be noticed that the Act of 1892 applies in terms to alleys only, which may be opened, &c., under three conditions, *i. e.* 1. When the owners of more than half of the

real in the square make application. 2. When the Commissioners shall certify that the preservation of peace, good order, and public morals require that such alley be opened. 3. When the Health Officer shall certify that such opening, &c., is necessary for the public health.

In the Act of 1894, from which alone the Commissioners acquire authority to open minor streets, such streets may be opened "whenever in the judgment of said Commissioners the public interests require it."

The District made return referring to two other cases filed in the Circuit Court, which disclosed the proceedings, or so much of them as pertain to the discussion of the questions raised here, which were taken in the opening of said minor street.

ARGUMENT.

I. The Constitutionaity of the Act.

a. The validity of the law is attacked on the ground that Congress has by a *general* law provided that the taxing district in the case of opening minor streets and alleys, shall be the square in which the street or alley is opened or widened, as the case may be. This would seem to the average mind to be the fairest method of assessment; for it would be difficult to perceive in what manner owners of property in other squares, unless contiguous, would be benefited by the opening of a street or alley not contiguous to their property, in any other way than the general public is benefited.

The argument for the plaintiff-in-error proceeds upon the theory that the jury is absolutely required to assess benefits against all the lots in the square. There is no such requirement in the law. The amount of the damages and costs are apportioned only as the lots "may be benefited." The only limitation upon the jury was that it should not go beyond the square to assess benefits.

It is not contended, nor could it be reasonably urged, that all the various acts, and they are numerous, passed by Congress to open minor streets and alleys and providing that the costs and damages accruing be assessed back upon the property in the particular squares mentioned, are invalid and unconstitutional; but because Congress has provided this same thing by a *general* law, the law therefore, is unconstitutional. The argument is that Congress has not considered in this particular instance what area will be specially benefited, and can not say, therefore, generally what area will be benefited. The proposition, then, is reduced to this,—Congress cannot, legally, consider the similarity of several situations and legislate for them together as a whole, but must deal with each piece of land separately. In the present case Congress unquestionably had in mind the similarity in benefits and damages that would arise in the various squares by the opening of minor streets and alleys. Substantially the same provisions, in this respect, have been reenacted by the Act of February 23, 1905, amending sections 1608 *et. seq.* of the Code.

A determination by Congress or by the legislature of a State of the area to be benefited by certain improvements, and the assessment to be laid upon that area, is properly within the function of Congress or the legislature, and cannot be disputed at this late day.

Land may be taken for a highway and the cost of the improvement assessed against the property benefited.

Shoemaker *vs.* U. S., 147 U. S., 283.
Bauman *vs.* Rose, 167 U. S., 548.

"Neither can it be doubted that, if the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered benefited by a proposed improvement."

Williams *vs.* Eggleston, 170 U. S., 304, 311.

In Parsons *vs.* District of Columbia, 170 U. S. 45, the Supreme Court upheld a tax laid at an arbitrary rate, where the act determined the *area* to be benefited, and determined the *benefit* to be at a specified rate, *i. e.*, $1.25 per front foot. In this case the court cites with approval the following passage from 2 Dillon, 4th ed. sec. 752:

"Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter made, whether the assessment shall be upon all the property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency."

The only case cited by the plaintiff-in-error to maintain his somewhat novel position is that of Norwood *vs.* Baker, 172 U. S. 269. It is now the generally accepted view that that case stands alone upon the peculiar facts disclosed therein, and is not to be broadly cited as laying down any new doctrine for the application of special assessment principles. The Court of Appeals in attempting to follow that decision, declared a great part of the Act for the street extensions to be unconstitutional, and that decision was reversed here, thus showing that this Court did not intend to enunciate any new principle in the law relating to special assessments. See Wight *vs.* Davidson, 181 U. S. 900. This last case, sustaining the street extension act, which, by the way contains a very analagous provision to the one under discussion in that it provided generally what property should be assessed for the opening and extension of new streets without making any particular provision for specified areas, contains a very interesting review of the various acts relating to special improvements.

It seems to us that this Court has already, and repeatedly, decided the principle involved in this case, in the various

cases upholding the validity of the laws of different States applicable to irrigation districts.

Hager *vs.* Reclamation District No. 108, 111 U. S. 701.

"It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarial districts, and of levees to prevent inundations, as well as for the openings of streets in cities and of roads in the country."

* * * * * * *

"The fact that the lands may be situated in more than one county, cannot affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate.

* * * * * * *

"The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charge shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable." If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. * * * Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. County of Mobile *vs.* Kimball, 102 U. S. 691, 704. The rule of equality and uniformity prescribed in cases of taxation for State and county purposes, does not require that all property, or all persons in a county or

district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in Louisiana *v.* Pillsbury, 105 U. S. 278, 295, there would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that he who reaps the benefit should bear the burden, must in such cases be applied." Pages 704, 705.

"When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State especially and immediately benefited by the expenditure." 703-4.

County of Mobile *v.* Alabama, 102 U. S. 691.

"It is impossible to apply to the varying wants of a municipality the rule invoked with reference to State taxation for State purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied. The same construction of a similar clause in the constitution of other States has been adopted by their highest courts. The Constitution of Virginia of 1850 prescribed that 'taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law;' and the Court of Appeals of the State held that the provision related solely to taxation for purposes of State revenue, and did not apply to taxes by counties and corporations for local purposes. Gilkeson *v.* The Frederick Jus-

tices, 13 Grat. (Va.) 577. The Constitution of Arkansas of 1836 provided that 'all property subject to taxation shall be taxed according to its values,—that value to be ascertained in such manner as the General Assembly shall direct,—making the same equal and uniform throughout the State;" and the Supreme Court of the State held that the provision was intended to apply to State revenue, and was not applicable to taxes levied for county purposes. Washington *v.* The State, 13 Ark. 752. See also McGhee *v.* Mathis, 21 id. 40."

Louisiana *v.* Pillsbury, 105 U. S. 278, 295-6.

The fact the use of water in an irrigation district is limited to the land owners therein, without previously giving every resident in the district a right to share in the use, although any land owner has the right to sell any or all of portion, does not prevent the use from being public.

Fallbrook Irrigation Dist. *v.* Bradly, 164 U. S. 112.

Land which can be beneficially used to a certain extent without irrigation may yet be so much improved by it that it can be properly included in the irrigation district and assessed for the benefits of the artificial irrigation as a public improvement. Idem.

"In the matter of sewers there is a natural beneficial district, to wit, the territory drained, and as to such cases the courts have had little difficulty in accepting the conclusiveness of the legislative determination regarding the property benefited."

Judson on Taxation, sec. 371.
Gillette *v.* City of Denver, 21 Fed. Rep. 822.
Paulsen *v.* Portland, 149 U. S. 30.

In Mattingly *v.* District of Columbia, 97 U. S. 687, it was said:

"It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special

road or street improvements very often are oppressive. But that the legislative power may authorize them and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property at its discretion, is, under the decisions, no longer an open question."

Judson on Taxation says:

"The same principle has been applied to the opening, widening and paving of streets and sidewalks. Thus an assessment under the statute of New York making a taxing district of the lands lying within three hundred feet on either side of the street improved was sustained and held valid as to all parcels of land which were included within that district, though some of them did not front upon the street. The court affirmed the judgment of the New York Court of Apeals, which had said in its opinion: 'The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action can not be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason;' and added, at page 355:

"The legislature in the exercise of its power of taxation, has a right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the teritorial district which should be taxed for a local improvement is within the province of legislative discretion. * * * If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

* * * * * * *

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislatures of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners."

The Act of Congress for opening streets in the city of Washington and providing for apportioning for one-half of the cost upon the lands found to be benefited was sustained as not violative of the Fifth Amendment. The court said it was for the legislature and not for the judiciary to determine, whether the expense of a public improvement should be borne by the whole city, or by the district, or by the property immediately benefited. The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be fixed in proportion to the frontage, area, or market value of the lands, or in proportion to the benefits as estimated by the commissioners. It was within the power of Congress to include as benefited all lands lying within the benefited district, and Congress might submit the question of what parcels of land were benefited to the determination of the tribunal intrusted with the authority of making the assessment." (Citing Bauman *v.* Ross, supra.)

Judson on Taxation, sec. 372.

"A Kentucky statute authorized the city government of Louisville to open and improve streets at the exclusive cost of the owners of lots in each one-fourth of a square, to be equally apportioned by the council according to the number of square feet owned by them respectively, except that

corner lots of prescribed dimensions paid twenty-five per cent. more than others, each subdivision of territory bounded on all sides by principal streets being deemed a square. This statute has been sustained by the Kentucky Court of Appeals (Preston *v.* Roberts, 12 Bush. 57; Peck *v.* Obst, 12 Bush, 268; Broadway Baptist Church *v.* McAlee, 8 Bush, 508) and its judgment was affirmed on motion by the Supreme Court, (Watson *v.* Nevin, 128 U. S. 578) as the contention had been pressed upon them before and determined adversely, so that there was no necessity for its being argued."

Judson on Taxation, sec. 373.

Welty says:

Sec. 308.

"It becomes a question sometimes whether a contemplated improvement within a municipal corporation in nearly equal proportions of a benefit to the public and a special benefit to the property of a local district, ought to be a public charge, or be made at the expense of the property specially benefited. When such a state of facts exist, it becomes a matter of discretion in the governing power of the municipality to determine whether the property benefited shall bear the expense or whether the cost of the improvement shall be made a public charge, and this discretion when exercised is not the subject of review by the courts.

Section 309. EXERCISE OF THE DISCRETION; RESUMPTION OF BENEFITS.—Where the question whether the improvements contemplated shall be made at the expense of the property to be benefited, or be paid for by general taxation, is delegated for determination to the discretion of municipal authority, and this discretion has been exercised by directing the expense to be borne by the property benefited, no other formal finding than such action is necessary to establish the fact that the property to be assessed will be benefited to an amount equal to the expense

of the contemplated improvement or to some portion thereof. The exercise by a municipal corporation, of the authority when delegated, to condemn property necessary to be taken for an improvement, and to assess, through a tribunal of its own appointment, damages therefore upon the property specially benefited thereby, "is a distinct legislative declaration of the local character of the improvement, and that the lands in the locality thus specially affected by it, may be sufficiently enhanced in value to compensate for the burden of sustaining the whole expense." But an assessment made upon a basis of frontage merely and without regard to benefit or proportionate benefit, may be impeached, notwithstanding the record of the proceedings be regular—in an action or proceeding to enforce the assessment. In the absence, however, of fraud, a dtermination that certain property is benefited, is conclusive."

(Welty on Law of Assessments, Secs. 308-309.)

* * * * * * *

"The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia."

Parsons *vs.* District of Columbia, 170 U. S., 52.
Citing Mattingly *vs.* District of Columbia, 97 U. S., 687.
Gibbons *vs.* District of Columbia, 116 U. S., 404.
Shoemaker *vs.* United States, 147 U. S., 282.
Bauman *vs.* Ross, 167 U. S., 568.

IRREGULARITIES COMPLAINED OF.

1. The plaintiff-in-error complains that it does not affirmatively apear that the owners of more than one-half of the land in the square requested the opening of this minor street; that some of the petitioners signed as trustees, one

as executrix and one as attorney. It does appear affirmatively that these persons described themselves, in the petition for the opening of the said minor street, as owners of property and that they were so carried on the tax rolls of the District of Columbia; and this would imply that they were charged with taxes and paid the same. This makes a prima facie showing of ownership within the purposes of the statute, and in the absence of any averment to the contrary is certainly sufficient. There is no statement on the part of the plaintiff-in-error that these persons so representing themselves to be owners, were not in fact such, unless we except the statement contained in his brief that an executor is not and cannot be the owner of property. Without pausing to discuss this proposition in detail, is it enough to say that executors may, and frequently are, clothed with authority to sell real estate and convey a good title thereto, and are charged with payment of taxes and other burdens upon the property entrusted to their care. If this does not constitute ownership within the meaning of the statutes under discussion, it is difficult to perceive what would. Again, if the Commissioners of the District are compelled to go behind the return of the Assessor, what is their duty in the premises? Must they make, at their peril, a detailed examination of every step in the title and pass upon the construction of wills, deeds, or perhaps decide questions of fact as to adverse possession? If so, the Acts would be so hampered by a multitude of minutiæ that it would be useless to put them into operation, and the proceedings taken thereunder might be defeated at any time by showing that the Commissioners made a mistake upon the matters of law or fact involved in the numerous titles to be scrutinized. It is obvious that it could not have been the intention of Congress of casting any such burden upon those charged with the operation of the law. It submitted that the trustees, executrix, and attorney, who signed as owners of property in the square involved, being in possession and control of the property, being assessed therefor and paying taxes thereon, were "proprietors" within the meaning of the Acts.

It is objected, also, that although the signers to this petition might have been the owners on the date certified to by the assessor, December 23, 1897, yet the proceedings were not ordered until February 1, 1898, (plaintiff's brief, 14, 15) and that there is nothing in the record to show that such signers were, in fact, the owners on the latter date. Certainly there is nothing in the record in this case to disclose that there had been any change in the ownership of the property. There is not even an averment that there had been any change. In the absence of any such averment or showing, the presumption is that there was no such change.

Plaintiff-in-error further claims that there was no finding of ownership by the Commissioners, nor any approval by them of the assessor's certificate. These are merely captious objections; there is nothing in the Acts requiring either.

Moreover, it was not necessary that the owners of more than half the property in the square should petition before a minor street therein could be opened. The Act of 1894, which was in force at the time of these proceedings, expressly authorizes the Commissioners of the District of Columbia to open minor streets "whenever in their judgment the public interests require it." The power exercised by the Commissioners in the present instance, and the application to the marshal of said District to summon and empanel a jury, does not appear to have been based upon the petition of property owners nor to have been taken because such owners made application therefor, but such power and such action may well be referred to the authority conferred by the Act of 1894, above cited, and might, and could, have been taken in the absence of any petition on the part of property owners, and indeed, could have been so taken notwithstanding protests on the part of all or any part of such owners, for the Act specifies no other condition than that the Commissioners shall deem the improvement required by the public interests, in their judgment. That they did deem the improvement necessary is shown by their action in directing the proceedings to be taken; otherwise

the proceedings could not have been had, for they are made sole judges of the necessity for them.

As a matter of practice, the Commissioners of the District upon their own initiative direct the opening of minor streets, alleys, &c., in many instances. In many other cases, they take such action after their attention has been called to the situation desired to be remedied, which is usually done, as in this case, by a petition of the property owners.

2. The plaintiff-in-error also complains that there was no proper notice served upon him. The notice given is found on pages 7 and 8 of the record and was served upon the plaintiff-in-error personally, attested by the certificate of the marshal. Record, p. 8. And the plaintiff-in-error objects that the notice fails to inform him that the jury will assess benefits. The notice contains on its face a reference to the Acts of 1892 and 1894, above set out, under which the proceedings are to be conducted. The jury in this case viewed the square in which the said minor street was to be opened, as appears by the verdict, and sat and heard testimony on the question of damages and benefits. The plaintiff-in-error knew this was to be done, for the law required it; and for aught that appears or is even alleged, he did appear and give his testimony. Certainly, he had his opportunity.

3. The plaintiff-in-error alleges that there was no finding of benefits on the part of the jury called to assess damages and benefits by reason of the opening of this minor street. This is the merest quibble over the wording of the verdict found by the jury. They "apportion the amount of the said damages," and append two schedules to their verdict, one for damages to the property taken for the opening of the minor street, and the other containing the headings "square," "lot," "to whom assessed" and "amount of benefits." The jury did in fact find the benefits assessed and called them by that title, benefits, although it was not so stated in the body of the verdict itself, but only in the schedules so appended to the verdict. The law required the

jury to "apportion" the benefits, and that is exactly what they did. They had no power to lay the tax; only Congress could do that.

e. The next contention of the plaintiff-in-error is that the assessments exceeded the actual benefits and were in excess of the value of the land. This, however, is a disagreement between the land owner and the jury upon a question of fact, and a contention which has been conclusively determined by the verdict of the jury.

The plaintiff-in-error claims that the assessment exceeded the value of the land, and cites the assessment records to prove this. It is well known that the assessments are far below the real value of the property, below that for what it is usually sold even at auction sales. Moreover, the plaintiff leaves out of the argument the difference between these lots, as fronting on an alley and not available for building purposes, and their value as fronting on a street and capable of being used for the erection of dwellings. Congress has expressly provided in some of the acts passed for condemnation purposes that the jury shall assess the damages for the land taken as of the *present* value of the land taken, as in the present law, sec. 4 (Code, sec. 1608-h.), and assess the benefits as of the value of the land *as enhanced* by the opening of the street or alley. It is obvious, in the present case, that the opening of the street more than doubled the value of the property. The figures cited by the plaintiff prove nothing whatever.

The plaintiff-in-error attempts to demonstrate, by the assessed values, not by the market values, what the benefits actually were. The jury, however, were the judges of what benefits were received, and they were bound neither by the assssments of record nor by the estimates of the plaintiff. The apportionment was a matter left to their discretion and it is not to be set aside because the plaintiff thinks he has

been harshly treated. It is a question of judgment and discretion and not one of mathematics.

The Act of 1892, under discussion, contains a provision, section two thereof, that the jury shall ascertain and appraise damages which may accrue to any person for any land "which shall be the value of the land at the time of the taking." The benefits to be assessed are, under section five of the Act, such as accrue from the opening, &c. of the street or alley. Thus, there are two standards to determine the value of the land, i. e., one made before the land is taken, in its then condition, as a standard for the payment of damages; and the second, the value of the land as enhanced by the improvement in contemplation. The computation made by the plaintiff-in-error is made under one standard, the assessed value of the land, which is neither of the standards contemplated by law.

The law now in force, section 1608-h. of the Code of Laws for the District of Columbia, expressly provides for these standards, in clearer terms than they are provided for in the Acts under discussion.

"Sec. 1608-h. That if a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from such opening, extension, widening, or straightening, but such benefits shall be considered in determining what assessment shall be made on or against such part of such piece or parcel of land as may not be taken as hereinbefore provided."

The law now provides that benefits may be assessed not only on the lots in the square through which the minor street or alley runs, but also on the lots in the "squares or blocks confronting the square in which such alley or minor street is to be opened," &c. Sec. 1608-j. Code D. C.

Finally, the plaintiff cites cases in which the operation of the law would work great hardship, as in the case of a valuable building to be removed before a street could be cut through, the value of which would have to be assessed against the owners in that square. We cannot answer this better than by citing a remark of Justice Miller, in the case of U. S. *vs.* Lee, 106 U. S. 196:

"Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the right of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fall."

Respectfully submitted,

FRANCIS H. STEPHENS,
EDWARD H. THOMAS,
Attorneys for the defendant.

Supreme Court of the United States.

Nos. 190 and 191.—October Term, 1906.

No. 190. Thomas R. Martin, Plaintiff in Error,
vs.
The District of Columbia.

No. 191. Clarence A. Brandenburg, Plaintiff in Error;
vs.
The District of Columbia.

In Error to the Court of Appeals of the District of Columbia.

[March 11, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

These are writs of certiorari to test the validity of assessments for the widening of an alley in Washington under the Act of Congress of July 22, 1892, c. 230, (27 Stat. 255,) as amended by the Act of August 24, 1894, c. 328, (28 Stat. 501.) The writs were quashed by the Supreme Court of the District and the judgments affirmed by the Court of Appeals. 26 App. D. C. 140; 146. The principal case is that of Brandenburg, the owner of land taken for the widening. That of Martin raises questions as to the rights of a mortgagee of the same land. The main issue is upon the constitutionality of the Act. The statute authorizes the Commissioners of the District to condemn, open, widen, &c., alleys upon the presentation to them of a plat of the same accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, &c., or in certain other cases. After prescribed preliminaries the Commissioners are to apply to the marshal of the District to empanel a jury of twelve disinterested citizens, and the marshal is to empanel them, first giving ten days' notice to each proprietor of land in the square. The jury is to appraise the damages to real estate and also is to "apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid," including fixed pay for the marshal and jury, "according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending or straightening such alley," with certain deductions. The amendment authorizes the Commismissioners to open minor streets, to run through a square, &c., whenever in the judgment of said Commissioners the public interests require it.

The law is not a legislative adjudication concerning a particular place and a particular plan like the one before the Court in *Wight* v. *Davidson*, 181

U. S. 371. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection to the Act would not be disposed of by the decision in *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.

But when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. So it well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 344, to reconcile the decision in that case with *Norwood* v. *Baker*, 172 U. S. 269.

And yet it is evident that the Act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in *Wight* v. *Davidson*, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation, (181 U. S. 378, 379,) of *Bauman* v. *Ross*, 167 U. S. 548, when the same principle was sustained in a general law. 167 U. S. 589, 590. It is true again that in *Bauman* v. *Ross* the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only half the cost was charged in that case it may be that on the practical distinction to which we have adverted in connection with *Louisville & Nash-*

ville R. R. Co. v. *Barber Asphalt Paving Co.*, the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

In view of the decisions to which we have referred it would be unfortunate if the present Act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it "according as each lot or part of lot of land in such square may be benefited by the opening, &c." Very likely it was thought that in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears.

It is clear however from the petitions and the returns that the jury did not administer the statute in the way in which we have determined that it should be read. About one-fifth of each lot was taken, and was valued at $92 and $75 respectively. That would give a value of $368 and $300, at the most, to the remaining portions, before the improvement was made. These lots were assessed $650 less said $92, or $558, and $550 less said $75, or $475. It is most improbable that the widening of an alley could have nearly trebled the value of each lot. We think it apparent, as was assumed by the Court of Appeals, that the jury understood their duty to be to divide the whole cost among the land owners, whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. There is nothing in the record sufficient to show that the jury took a different view, or that they limited the assessment to the benefit actually conferred on these lots. For this reason the assessment must be quashed, and it will not be necessary to consider the special objections of the mortgagee.

Judgments reversed.

Mr. Justice HARLAN, Mr. Justice WHITE and Mr. Justice MCKENNA concur in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.